78-1820

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ASSOCIATED THIRD CLASS MAIL USERS,
Petitioner

v.

UNITED STATES POSTAL SERVICE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Associated Third Class Mail Users, prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-14a) is not yet reported. The Memorandum Opinion of the District Court (App. E, *infra*, pp. 18a-26a), is reported at 440 F. Supp. 1211.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, p. 15a, was entered on March 9, 1979. Petitioner's timely

petition for rehearing and suggestion for rehearing en banc were denied on April 3, 1979 (Apps. C and D, *infra*, pp. 16a, 17a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether identical advertisements directed to specific persons or to specific addresses even with no person named (*e.g.*, "occupant") are "letters" within the meaning of the Private Express Statute.

2. Whether the application of the Private Express Statute to such public advertisements is arbitrary or unreasonable in violation of the due process guarantee of the Fifth Amendment.

3. Whether the application of the Private Express Statute to such public advertisements denies members of Associated Third Class Mail Users equal protection of the law.

4. Whether the application of the Private Express Statute to such public advertisements violates the First Amendment rights of members of Associated Third Class Mail Users to freedom of speech.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the freedom of speech and due process guarantees of the First and Fifth Amendments, respectively, of the United States Constitution. They provide that "Congress shall make no law . . . abridging the freedom of speech" and that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

This case also involves a criminal statute, the Private Express Statute, 18 U.S.C. § 1696, which provides in relevant part as follows:

> "*Private express for letters and packets*
>
> "(a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place to any other city, town or place, between which the mail is regularly carried, shall be fined not more than $500 or imprisoned not more than six months, or both."

Sections 601-606 of Title 39 U.S.C., civil statutes, contain provisions describing the conditions under which a "letter" may be carried by private delivery companies (*i.e.*, by affixing regular postage and so forth) and authorizing searches for the seizure of mail matter transported in violation of law. These civil provisions do *not* create the postal monopoly. The monopoly is based on the criminal law provisions of Title 18 quoted above.

The relevant provisions of the Regulations under review below, 39 C.F.R. Section 310.1-.7, are reproduced in Appendix F of this petition (pp. 27a-35a).

STATEMENT OF THE CASE

The Postal Service claims that the slip opinions of the United States Supreme Court are "letters" which are subject to the postal monopoly.

John Jones comes home from work. On the hall table is an advertising flyer from Raleighs printed on a newspaper-sized paper folded three times to a 5½ inch by 8½ inch dimension. The flyer is not in an envelope. It has a sticker which says, "John Jones, 5678 P Street, N.W., Washington, D.C. 20008." (Or it might be addressed to "Occupant" or "Householder" at the same address.) Would Mrs. Jones say to her husband: "There's a letter for you from Raleighs on the hall table"? Probably not.

But the Postal Service claims that the Raleighs flyer—sent out in identical form by the thousands or tens of thousands—is a "letter" subject to the postal monopoly. The Postal Service takes this position even though such circulars are "disposed of as waste" "without examination of contents" by the local post office if they are mailed at third class rates, are undeliverable because the address is wrong and there is no guarantee of return postage by the mailer. Postal Service Manual § 159.412.

Petitioner, Associated Third Class Mail Users (ATCMU) does not challenge the Private Express Statute, 18 U.S.C. § 1696, a statute granting the United States Postal Service a monopoly on the delivery of first class letters. ATCMU does not intend or wish to establish a private delivery system, as the District Court seems to have assumed. (400 F. Supp. 1211, 1213, App. E, p. 19a). Recent court cases concerning the validity of the postal monopoly over first class mail, and concerning business enterprises which seek to compete with the Postal Service, have no bearing on the instant action.

ATCMU does challenge the validity of postal regulations extending the Private Express Statute to cover the distribution of *public advertisements*. Public advertisements (such as throwaway advertising flyers) are printed messages to the public directed in identical form to numerous persons or numerous addresses (sometimes hundreds of thousands or millions) without a person being named (*e.g.*, a message directed to "occupant").

Public advertisements, even when bearing or intended for a particular name or address, are directed to the public at large, or to a major segment of the public, with any person being invited to purchase the product or service. These public advertisements may be in the form of throwaway flyers, folders, brochures, single sheets or paper items in other forms. When sent on their own through the mail, they typically bear postage at the bulk

third class rate (either the regular rate or the lower not-for-profit rate, as appropriate). These public advertisements may be enclosed in an envelope, which may be sealed in order to facilitate handling by postal machinery. Sealed envelopes sent at third-class rates may be opened for postal inspection and, therefore, are not accorded privacy as are first-class items.

Bulk third-class mail gets no free forwarding service, no privacy of contents, must comply with elaborate and expensive mailer pre-sorting requirements, cannot use street collection boxes, gets deferred service at the lowest level given to any class or subclass of mail, and may even be disposed of as waste in certain circumstances.

The Postal Service takes the position that addressed public advertisements are "letters" and therefore subject to the postal monopoly and cannot be delivered by private firms without the payment of postage.

The Postal Service contends, for example, that a private delivery company may not (without payment of postage to the government) leave at a house or an apartment or an office a folder, which is identical with hundreds of thousands of other folders, asking for a contribution to the March of Dimes or to the Easter Seal Campaign or advertising a sale at Raleighs if that folder says on it "Occupant, 5678 P Street, N.W., Washington, D.C. 20008." Such folders, like slip opinions of this Court, are considered "letters" by the Postal Service.

By way of contrast, the Postal Service admits that the monopoly does not extend to addressed catalogs, to advertising supplements in newspapers delivered to particular persons, or to advertisements which are distributed at random.

The postal regulation defining public advertisements as "letters," 39 C.F.R. § 310.1-.7 (App. F., pp. 27a-35a), was promulgated on September 16, 1974. On September

21, 1976, ATCMU filed suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief, under the postal laws of the United States, 18 U.S.C. § 1696 and 39 U.S.C. § 101 *et seq.* The jurisdiction of the District Court rested on 39 U.S.C. § 409(a) (suit against the Postal Service) and 28 U.S.C. § 1339 (postal matters jurisdiction).

The National Association of Letter Carriers (NALC) filed a motion to intervene as a party defendant on December 7, 1976. The District Court granted NALC leave to intervene as a party defendant on January 3, 1977.

Because there were no material facts in dispute, the parties filed cross-motions for summary judgment, and in a Memorandum Opinion and Order dated November 29, 1977, the District Court, Barrington D. Parker, J., denied ATCMU's motion, granted the Postal Service and NALC motions, and entered judgment on behalf of the Postal Service and NALC. 440 F. Supp. 1211 (App. E, pp. 18a-26a).

While the decision of the District Court was being appealed, and before the Court of Appeals could decide the validity of the postal regulation in question, the Postal Service proceeded to propose new regulations "clarifying" the definition of "letter" as including public advertisements. Proposed Private Express Regulations, 43 Fed. Reg. 60615 (1978). The new regulations include even unaddressed public advertisements as "letters" if they are delivered by a "selective delivery plan," *e.g.*, according to a memorized list. *Id.*

Thus the Postal Service now claims that a throwaway unaddressed advertising flyer acquires the standing of a "letter" for postal monopoly purposes because, for example, a delivery boy commits a list of addresses to memory. Yet, the advertisements which will remain exempt from the Postal Service's definitions of "letter"—addressed catalogs, newspaper advertising supplements

and randomly distribution advertisements—are identical in purpose and content to the public advertisements which will be considered to be "letters."

On March 9, 1979, the Court of Appeals (Wilkey, J., dissenting)[1] affirmed the decision of the District Court upholding the validity of the challenged definition of public advertisements as "letters" within the scope of the Private Express Statute.

REASONS FOR GRANTING THE WRIT

1. Contrary to the Postal Service's definitions, public advertisements are not "letters" within the scope of the Private Express Statute. The Postal Service's construction flies in the face of common and ordinary usage. Webster's Dictionary (New International, 3d Ed.) defines "advertisement" as "a *public* notice" (emphasis added). A letter, on the other hand, is defined as "a written or printed message intended for the perusal *only* of the person or organization to whom it is addressed" (emphasis added), or in other words, a *private* message. To be sure, an advertising folder addressed to "Occupant" is intended for the perusal of "Occupant." The majority in the Court of Appeals made much of this poir. (Opinion at 13, App. A, pp. 11a-12a). However, such an advertising folder is not intended for the perusal *only* of "Occupant." It is also intended for the perusal of the public at large. This crucial distinction inherent in the common definition of "letter" was completely ignored by the majority below.

Thus, the definition of "letter" promulgated by the Postal Service is completely at variance with its common and ordinary meaning. Absent a contrary clear expres-

[1] Of the two judges in the majority, one, Flannery, J. (who was not present at the oral argument because of illness), was a District Judge of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

sion of intention, words in a statute must be read in accordance with their common usage. *March* v. *United States*, 165 U.S. App. D.C. 267, 276, 506 F.2d 1306, 1315 (1974) and cases cited therein.

The United States Court of Appeals for the District of Columbia Circuit emphasized this point in *The Lubrizol Corporation* v. *Environmental Protection Agency*, 183 U.S. App. D.C. 288, 562 F.2d 807 (1977):

> "Generally, courts accord statutory language its common sense meaning unless the statute, or its legislative history, require some other reading. . . . 'After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.'" 183 U.S. App. D.C. at 297, 562 F.2d at 816 (citations omitted).

The legislative history of the Private Express Statute does not require a non-common sense meaning of the word "letter," a fact conceded even by the majority (Opinion at 4-6, App. A, pp. 4a-5a). This alone would be sufficient to invalidate the Postal Service's definition of "letter".

However, beyond this, an examination of the language used by Congress in earlier versions of the Private Express Statute offers clear evidence that Congress considered public advertisements not to be "letters."

As the majority in the Court of Appeals noted, "few courts have considered the scope of postal monopoly or the meaning of 'letter.'" (Opinion at 5, App. A, p. 4a). No courts have considered the meaning of the word "letter" in the Private Express Statute in the context of public advertisements. This makes it all the more important for this court to grant certiorari, as this case involves an important federal question of first impression.

Ordinarily, an agency's long-standing interpretation of a statute which it is charged to administer is accorded judicial deference. Here, the Postal Service has demonstrated such lack of consistency in interpreting the definition of "letter" that even the majority in the Court of Appeals called the history of administrative interpretations of the statute a "muddle" (Opinion at 9, App. A, p. 8a). Judge Wilkey (Dissent at 1, App. A, p. 13a) found only one consistent theme in the administrative interpretation of the statute: The Postal Service

> "has always latched onto whatever interpretation of the word 'letter' which would give it the most extensive monopoly power which Congress at that time seemed disposed to allow.
>
> ". . . I find this total lack of any intellectual consistency offensive, especially when coming from a supposed-to-be responsible government agency . . ."

Despite all the evidence of administrative bumbling and inconsistency, the majority in the Court of Appeals curtly held (Opinion at 12, App. A, p. 11a) that "whatever ambiguity or inconsistency existed" is not "grounds" to set aside the current administration definition classifying public advertisements as "letters." However, this Court has placed great emphasis on the consistency of administrative interpretations. *See Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974). Additionally, the courts have accorded deference only to those administrative interpretations that show some semblance of being well-reasoned. *See Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). As we have shown above, the Postal Service's interpretation does not measure up to this standard.[2] The inconsistencies and ambiguities in interpretation of the Private Express Statute, as Judge Wilkey found, are the result of 150 years of bureaucratic power grabbing by the

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[2] *See also*, pp. 11-12, *infra*.

Postal Service, which the courts should not countenance. (Dissent at 1, App. A, p. 13a).

This "power grabbing" is a matter of increasing concern. For example, the Federal Communications Commission (FCC) is opposing the Postal Service's proposed regulations (43 Fed. Reg. 60615 (1978)) to extend the private express monopoly to hard copy messages (except telegrams) involving electronic communications. *The Wall Street Journal*, Eastern Edition, March 14, 1979, page 12. This article quotes a letter from the General Counsel of the FCC as saying that the Postal Service proposal would

> "significantly thwart the FCC's recent efforts to stimulate new electronic message services by opening competition in the public message telegraph field, and is likely to increase the cost and reduce the quality and diversity of such services to the public."

Such "power grabbing" is of concern not only because it is outside the scope of statutory authority, and thus illegal, but also because, as the FCC noted above, it results in needless cost and a lack of open competition. ATCMU wishes its members to have an alternative to being a captive audience of the postal corporation. The basic "minimum per piece" postal rate for bulk third class mail has increased 740% since the early 1950's! During that same period the Consumer Price Index (all items-1967=100) has gone up about 170%, a small increase by comparison to the inflationary increases in third class mail rates. It is no wonder that the President has announced that unnecessary regulations are a contributing cause of inflation, and has declared a national policy of ensuring that regulations "do not impose unnecessary costs to the American economy." Material from Presidential Documents, Vol. 14, No. 15, April 17, 1978 at 723-24.

If this Court does not grant the writ, the Postal Service will continue to aggrandize its own power in defining

the extent of the postal monopoly. At a minimum, this Court should remand to the Court of Appeals to consider the impact of its opinion and judgment on the raging controversy over whether the postal monopoly applies to "electronic mail."

2. If construed to include public advertisements, the Private Express Statute is arbitrary and unreasonable in violation of the due process guarantee of the Fifth Amendment.

Here the Postal Service claims that public advertisements that are addressed are "letters" while unaddressed advertisements are not. Using the Postal Service's address criterion, by some bureaucratic legerdemain a public advertisement is transformed into a "letter" by the minor convenience of attaching or stamping an address on the advertisement. Moreover, under proposed regulations, "unaddressed" advertisements *would be considered* "addressed" if delivered according to a "selective delivery plan," *e.g.*, by memorizing a list. 43 Fed. Reg. 60615 (1978).

These determinations are blatantly unreasonable. In one case, where an address label is used, the advertisement is claimed to be a "letter," and in the other case, where there is no address label, it is not. This is an irrelevant detail and an unrelated formality when it comes to determining anything with such significant financial consequences as whether an item is a "letter."

The majority in the Court of Appeals rejected ATCMU's constitutional attack on the postal regulation by referring to the analysis of the District Court. (Opinion at 13-14, App. A, p. 12a). The District Court (440 F. Supp. 1211, 1216, App. E, p. 25a), analyzing this issue in a mere two sentences, upheld the definition of "addressed" public advertisements as "letters" against attack on due process grounds by noting that addressing was *important to ATCMU's advertising goals.*

ATCMU respectfully suggests that both Courts below erred in relying on the significance of addressing *to ATCMU*. The relevant factor in determining the constitutional validity of the classification is not the value of addressing *to ATCMU members*, but rather the reasonableness of using addressing to distinguish subject matter which is within the postal monopoly from that which is not.

An address on a personal letter has a significance which differs from an address on a public advertisement, for in *private*, individualized messages, the name and address are an integral part of and give meaning to the message itself. A letter directed to "Aunt Minnie" is highly personalized and has full meaning to her alone. The arbitrariness of the Postal Service's standard lies in applying this criterion to non-personal messages such as public advertisements which have meaning—and are meant to have meaning—to the public at large independent of an address on an address level.

3. By exempting newspaper advertisements and catalogs from the postal monopoly (as non-"letters") while defining public advertisements as "letters" subject to the postal monopoly, the Postal Service's interpretation of the Private Express Statute denies ATCMU equal protection of the laws under the Fifth Amendment.

Newspaper advertising supplements, sometimes also called free-standing stuffers, are functionally equivalent to advertising circulars delivered alone. These supplements usually are not printed by the newspaper but are merely "stuffed" or folded into the newspaper for delivery. Free-standing stuffers not only have the same text as other advertising circulars (such as those sent through the mails), "they are physically the same product of ink and paper, the only difference being that the address in one instance is imprinted on the outside of the newspaper and in the other instance on the envelope containing only the circular or the circular itself." (Wilkey, J., Dissent at 2, App. A, p. 14a).

Yet according to the Postal Service, of these identical public advertisements, both delivered to specific addresses, one is considered a "letter" and the other is not, merely because the non-"letter" is in physical contact and delivered with a newspaper. As Judge Wilkey points out, there is no valid distinction between the two. The only basis for this discriminatory classification is whether the advertisement is folded into a newspaper. This difference has no relationship to the object of the Private Express Statute, which is to protect the viability and revenue of the United States postal system. If the government has determined that advertisements must be subject to the monopoly in order to protect the postal system, then all advertisements must be so covered, whether or not they are in physical contact with newspapers.

The same may be said for the classification of "catalogs" as non-"letters." A public advertisement can classify as a "catalog" if it consists of at least 24 bound pages. (39 C.F.R. § 310.1(a)(7)(v), App. F, p. 29a). Catalogs and public advertisements both have the same advertising and merchandising purposes, are aimed at the public (or large segments of the public), and are addressed and distributed to specific persons or addresses. Yet the Postal Service discriminatorily classifies addressed public advertisements with one or ten or twenty pages as "letters" while classifying public advertisements with 24 bound pages as non-"letters." This is unreasonable and arbitrary since there are no material differences between short and long public advertisements. It is difficult to see why the binding or number of pages is relevant to determining whether something is a "letter." The "letter" to Aunt Minnie remains a "letter" regardless of its length. Yet a public advertisement—or a slip opinion of this Court—can become a non-"letter" by adding pages and binding. Further, length bears no relationship—much less

a fair and substantial relationship—to the revenue-protection objective of the Private Express Statute.

The majority in the Court of Appeals again upheld the Postal Service's regulation by referring (Opinion at 13-14, App. A, p. 12a) to the opinion of the District Court (440 F. Supp. 1211, 1216 (1977), App. E, p. 26a). In dismissing ATCMU's equal protection claim, the District Court relied on the traditional Congressional exemption of newspapers and periodicals from the postal monopoly to avoid restrictions on the press.

ATCMU does not challenge the exemption of *newspapers*, but rather the arbitrary classification of identical public advertisements as "letters" or non-"letters" based upon whether or not they are delivered with a newspaper. Apart from Judge Wilkey, no one in either court below addressed this point. The same may be said about the exemption of "catalogs." The District Court merely concluded that "[a]t some point catalogs become too large to fit into the *common usage* of the term 'letter'" (*Id.*, emphasis added), without explaining how this is relevant to the purpose of the postal monopoly. Moreover, if the courts below had indeed applied the common usage and meaning of the word "letter," ATCMU would have prevailed.

4. If construed to include public advertisements, the Private Express Statute unconstitutionally violates ATCMU members' First Amendment rights to freedom of speech.

As interpreted by this Court, the First Amendment includes protection of purely commercial advertising. In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976), this Court struck down a Virginia statute which prohibited a licensed pharmacist from advertising the prices of prescription drugs. It is important to note that the Virginia statute did not purport to forbid anyone wishing to compare prices at various stores from *receiving* this price information either in person or by phone. 425 U.S. at 782 (Rehnquist, J., dissenting). The statute only banned a particular *method* of making the information available. The analogy to this case is clear—the challenged postal regulation also bans a particular method of making commercial information available to the public.

To be sure, the government has a legitimate interest in protecting the viability of the postal system. However, Congress determined that this goal would be accomplished by prohibiting the private express of "letters". ATCMU in no way seeks to overturn this Congressional judgment. ATCMU merely argues that "letter" should be restricted to its proper meaning—*private* messages. This limited monopoly may be needed to maintain a nationwide system "to bind the nation together through the . . . correspondence of the people" (39 U.S.C. § 101(a)). However, no such justification exists for such a monopoly over public advertisements.

Without the overriding governmental interest which is present in maintaining a monopoly on the delivery of private correspondence, the substantial burdens imposed on commercial free speech by the Postal Service's extension of the monopoly to public advertisements must result in the Constitutional invalidity of the postal regulation in question.

The United States Court of Appeals for the Second Circuit recently held that certain organizations threatened with prosecution under a postal statute for depositing unstamped notices and pamphlets in approved letter boxes of private homes had adequately stated a claim that the statute infringed upon their First Amendment rights. *Council of Greenburgh Civic Associations* v. *USPS*, 586 F.2d 935 (2d Cir. 1978).

In the instant action, the majority of the Court of Appeals found ATCMU's First Amendment claim "without merit." (Opinion at 13-14, App. A, p. 12a). In so finding, the Court of Appeals deferred to the District Court's "careful analysis." In fact, the District Court treated the First Amendment issue in a single paragraph (440 F. Supp. 1211, 1216, App. E, p. 25a), declaring the burden on ATCMU's members to be "speculative" and no different from the burden imposed on any person subject to the Private Express Statute.

The Private Express regulation in question imposes a substantial, nonspeculative restraint on the dissemination of advertising information. The basic rate for bulk third class mail has increased 740 percent since the early 1950's. The sorting requirements for using this rate have been made more onerous and expensive without any compensatory adjustment in the rate. Far from being "speculative," as found in the District Court's cursory analysis, the burden imposed on ATCMU results from the present, continuing effects of *existing* rates and sorting requirements.

Nor is the burden on ATCMU members identical to the burden imposed on others. Defining public advertisements as "letters" hurts small businesses the most, and inhibits business competition. A neighborhood hardware store, for example, may want to have circulars advertising a coming sale delivered by private delivery to its charge account customers in a relatively small geographical area. Unlike a large chain store, such a small retailer is not likely to be able to afford an advertising supplement promoting its sale folded into a newspaper—particularly since the circulation of the newspaper almost certainly is broader than the neighborhood hardware store wishes to reach. This anti-competitive effect of the Postal Service's classification of public advertisements as "letters" is yet another reason for granting the writ.

CONCLUSION

The petition for a writ of certiorari should be granted. If the petition is denied, this Court should remand this case to the Court of Appeals to consider the impact of the Court of Appeals' decision on the controversy over whether the postal monopoly applies to "electronic mail."

Respectfully submitted.

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June 7, 1979

Appendices

APPENDIX A

[Notice: The opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1065

ASSOCIATED THIRD CLASS MAIL USERS, APPELLANT

v.

UNITED STATES POSTAL SERVICE, *et al.*

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 76-1768)

Argued November 20, 1978

Decided March 9, 1979

Before WRIGHT, *Chief Judge*, WILKEY, *Circuit Judge*, and FLANNERY,* *District Judge*.

Opinion for the court filed by *Chief Judge* WRIGHT.

Dissenting opinion filed by *Circuit Judge* WILKEY.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

WRIGHT, *Chief Judge*: This appeal is from the District Court's grant of summary judgment in favor of the United States Postal Service in a suit challenging the Service's construction of the century-old legislation which establishes and defines the current Government monopoly over the delivery of mail. Appellant, the Associated Third Class Mail Users (ATCMU),[1] asserts that the prohibition against private conveyance or delivery of "letters and packets" in what are known as the Private Express Statutes[2] may not lawfully be applied to delivery of advertising circulars addressed to particular persons or locations.[3]

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[1] The National Mass Retailing Institute (NMRI) appeared as *amicus curiae* in support of appellant.

[2] Like the parties, we use the phrase "Private Express Statutes" to refer to the group of statutes which create the postal monopoly and set forth the conditions under which private persons may carry letters. The central statute at issue in this case is 18 U.S.C. § 1696 (1976), which provides in relevant part:

> § 1696. Private express for letters and packets
>
> (a) Whoever establishes any private express for the conveyance of *letters or packets*, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place to any other city, town, or place, between which the mail is regularly carried, shall be fined not more than $500 or imprisoned not more than six months, or both.

(Emphasis added.) Other provisions relating to the postal monopoly are set forth in 18 U.S.C. §§ 1694-1699 (1976) and 39 U.S.C. §§ 601-606 (1976).

The parties are apparently in agreement that the term "packet" means simply a packet of letters and adds nothing of relevance here to the scope of the monopoly. "Letter" thus remains the crucial term.

[3] ATCMU uses the phrase "public advertisements" to describe the materials in suit. The Postal Service and NMRI refer to them as "addressed advertising circulars" or "addressed advertisements." The difference is apparently only semantic. All seem to have in mind the same sorts of materials: advertising flyers or brochures, sealed or unsealed, that are addresssed to particular persons or to the occupants of particular premises. Appellant seeks the option of using private delivery services for these materials.

The Postal Service takes a contrary position.[4] It has determined by regulation that the term "letter" in the statutory proscription encompasses any "message *directed to a specific person or address* and recorded in or on a tangible object"[5]—a definition which clearly includes addressed advertising materials. This litigation turns on the validity of that definition.

The District Court concluded that since the mid-19th century "the Congress, the courts and the Postal Service have all understood the Private Express Statutes to prohibit the private carriage of messages such as [those at suit]." *Associated Third Class Mail Users* v. *United States Postal Service*, 440 F.Supp. 1211, 1216 (D. D.C. 1977). Finding no constitutional infirmity in that interpretation, Judge Parker went on to award summary judgment in favor of the Postal Service and dismiss the complaint. We affirm, relying heavily upon the District Court's thoughtful opinion.

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[4] The National Association of Letter Carriers appeared as an intervenor-appellee.

[5] (Emphasis added.) This definition is contained in the regulations concerning enforcement of the Private Express Statutes. *See* 39 C.F.R. § 310.1(a) (1977). That section goes on to make clear that "[i]dentical messages directed to more than one specific person or address * * * constitute separate letters." 39 C.F.R. § 310.1 (a)(6).

Appellant asserts that promulgation of these regulations, which have the effect of defining the federal crime of transporting letters outside the mails, was beyond the authority of the Postal Service. We disagree. As the District Court observed, *Associated Third Class Mail Users* v. *United States Postal Service*, 440 F.Supp. 1211, 1214 (D. D.C. 1977), the Service is authorized under 39 U.S.C. § 401(2) (1976) to promulgate regulations to further the objectives of Title 39, which includes provisions concerning the postal monopoly. While 18 U.S.C. § 1696—the private express provision at issue here—is not a part of Title 39, its purpose is intimately connected to that title, and it was only separated from the other private express sections in 1909 when the United States criminal laws were codified into Title 18. Accordingly, a fair reading of the rulemaking authority of 39 U.S.C. § 401(2) is that it extends to § 1696.

Our task, and that which faced the District Court before us, is to determine whether the Postal Service's construction of the term "letter" is consistent with the text and history of the Private Express Statutes. For a number of reasons, it is a less than satisfying task. First, our usual tools for statutory construction turn out not to be terribly helpful. Nothing in the phrase "letters and packets" answers the question before us, and the intent of the Congress which enacted that formulation in the course of the 1872 codification of the postal laws is shrouded in obscurity.[6] Moreover, even were the legislative intent less opaque, it might be robbed of currency by the not insubstantial developments of the intervening century. Second, few courts have considered the scope of the postal monopoly or the meaning of "letter."[7] Third, the Postal Service's interpretations and comments regarding the content of the term have often seemed ambiguous

[6] *See* Part I *infra*.

[7] The decision most nearly on point is *Nat'l Ass'n of Letter Carriers* v. *Independent Postal System of America*, 336 F. Supp. 804 (W.D. Okla. 1971), *aff'd*, 470 F.2d 265 (10th Cir. 1972) (hereinafter cited as *IPSA*). There it was held that unsealed printed Christmas cards sent by businesses to particular persons but bearing no personal message were letters within the meaning of the Private Express Statutes and hence subject to the postal monopoly. The similarities between the materials at suit in *IPSA* and the advertising materials at issue here are obvious.

In *United States* v. *Bromley*, 53 U.S. (12 How.) 88 (1851), the Supreme Court held that an unsealed merchandise order sent to a tobacconist was subject to the postal monopoly and observed that the private express provision was a "revenue law" within the meaning of a statute authorizing Supreme Court review of dispositions of civil actions "brought by the United States for the enforcement of the revenue laws of the United States * * *." 53 U.S. (12 How.) at 96.

Two circuits have recently sustained the general constitutionality of the postal monopoly in decisions involving conceded violations of the statute. *See United States Postal Service* v. *Brennan*, 574 F.2d 712 (2d Cir. 1978); *United States* v. *Black*, 569 F.2d 1111 (10th Cir.), *cert. denied*, 435 U.S. 944 (1978). Neither purported to construe the term "letter."

and inconsistent.[8] And fourth, the only policy concern clearly implicated in the quest for the proper scope of the monopoly—the need to shield postal operations from competition so the Postal Service can adopt nonmarket solutions in its effort to further various national goals[9]—is so open-ended and indeterminate that it provides scant guidance. These difficulties do not, of course, obviate the need for decision. But they necessarily color our inquiry and belie any notion that a single definition of "letter" flows ineluctably from the materials at hand.[10]

ATCMU and the National Mass Retailing Institute (which appeared as *amicus curiae* on behalf of appellant) assert that the Postal Service's definition of "letter" must fall because it (1) runs counter to the legislative history, (2) contradicts the weight of administrative authority, (3) is contrary to common sense, and (4) would if sustained lead to constitutional difficulties. We deal with each contention in turn.

I

The statute creating the postal monopoly was first couched in its modern form—as a prohibition against establishment of "any private express for the conveyance

[8] *See* Part II *infra*.

[9] For example, the cross-subsidization inherent in establishment of uniform rates regardless of distance for each class of sealed mail pursuant to 39 U.S.C. § 3623(d) (1976) is inconsistent with a fully competitive market, as is the decision to locate post offices in some out-of-the-way places.

[10] We agree completely with the dissent that "the desired scope of the Postal Service's monopoly * * * is entirely a question of public policy," dissent at 1, and share the view that Congress is the appropriate body to set the nation's policy in this regard. Indeed, we are hopeful that our recital of the ambiguities and uncertainties will spur Congress to give the matter some attention. We do not agree, however, that the desirability of a fresh look by Congress, standing alone, would justify a decision overturning the Postal Service's regulations and, by thus leaving matters in limbo, forcing Congress' hand.

of letters or packets"—in Section 228 of the Postal Act of 1872. Act of June 8, 1872, ch. 335, § 228, 17 STAT. 311. The previous statute had referred to conveyance of "any letters, packets, or packages of letters, or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals * * *." Act of March 3, 1845, ch. 43, § 9, 5 STAT. 735. ATCMU argues that the deletion of the "other matter" language reflected a deliberate congressional choice to narrow the postal monopoly, and that by so narrowing it the Congress eliminated any suggestion that it might include addressed advertising materials. As Judge Parker pointed out, however, the legislative history indicates that the 1872 Act was intended to reword and clarify the nation's postal laws *without substantive alteration.* 440 F.Supp. at 1214.[11] ATCMU has been unable to demonstrate that this general intent did not apply with full force to the monopoly provision. And absent some indication that Congress focused on the issue, we are reluctant to find in what purported to be a recodification a deliberate contraction of the postal monopoly.[12] Accord-

[11] *See* Report of the Commissioners to Revise the Statutes of the United States, H.R. Misc. Doc. No. 31, 40th Cong., 3d Sess. 2 (1869).

[12] NMRI argues that the prior statutory language is irrelevant under the principles set forth in *United States* v. *Bowen*, 100 U.S. (10 Otto) 508 (1879), which held that the revised statutes became the law of the land when they took effect on the first day of December 1873 and that resort to prior statutes was improper when the meaning of the language used in the revision was plain. 100 U.S. (10 Otto) at 513. This argument depends, of course, on the contention that the 1872 Act is unambiguous—a contention we find lacking in merit. NMRI relies in part on the sections of that Act concerning the classification of the mail into first, second, and third classes. Those sections provide:

> Sec. 130. That mailable matter shall be divided into three classes: first, letters; second, regular printed matter; third, miscellaneous matter.
>
> Sec. 131. That mailable matter of the first class shall embrace all correspondence, wholly or partly in writing, except book-

ingly, we are of the opinion that the legislative text and history—while not dispositive of either party's contentions—tends to favor the Postal Service.[13]

II

While the legislative history of the Private Express Statutes is quietly obscure, the administrative history is noisily so. Each side is able to point to pronouncements by Postal Solicitors and statements in Service publications which support its view. And each side is able to characterize the pronouncements and statements relied

> manuscripts and corrected proof-sheets passing between authors and publishers.

Act of June 6, 1872, ch. 335, 17 STAT. 300. We do not think these sections convert an otherwise unclear statutory proscription into a clear one. Nothing in either the private express prohibition or the classification provisions suggests that the latter were intended to supply a definition of general applicability or to freeze the content of the postal monopoly. Indeed, §§ 130 and 131 do not purport to define *letter* at all. They merely use the term as an introductory label for a category which they go on to define. The result is not to shed a great deal of light on either the introductory label or the category. We are unwilling to conclude on the basis of these sections that the meaning of the private express provision is so unambiguous as to render resort to the prior statute invalid under *Bowen.*

[13] We do not fully share the District Court's confidence that a broad view of the monopoly is the only one which may fairly be gleaned from the 1872 Act. The District Court was apparently persuaded in part by the argument that to attach substantive import to the deletion in that Act of the "other matter properly transmittable * * * except newspapers, pamphlets, magazines and periodicals" language would as a logical matter lead to the conclusion that Congress meant both to strike "other matter properly transmittable" from the scope of the monopoly and to eliminate the exception for newspapers and the like—thus rendering them subject to the monopoly. *See* 440 F.Supp. at 1214 n.6. We do not think the latter conclusion necessarily follows. Rather, if "newspapers, pamphlets, magazines and periodicals" were within the "other matter properly transmittable" category but not within the term "letter," then the deletion of the "other matter" category would render an exception for newspapers and the like unnecessary. Thus appellant's construction does not as a matter of logic lead to the implausible conclusion that newspapers are subject to the monopoly.

upon by the other as poorly reasoned, ambiguous, or casual.[11] In our judgment, the most that can be said about the administrative history is that it is something of a muddle: no single definition emerges as the obvious choice of past administrators, but neither does there appear any clear ground for setting aside the determination of present ones. The following rough and far from exhaustive sketch illustrates our point.

After the 1872 legislation was adopted there were indications that the Postal Service conceived of the monopoly in somewhat limited terms. In the course of an 1873 opinion which concluded that a package of first class letters was subject to the monopoly whether sent by a private person or a government agency, the Solicitor stated that the Private Express Statutes were intended to prevent "the transmission of mailable matter of the first class (all correspondence wholly or partly in writing) by express or other unlawful means." [15] And notes appended to late 19th century editions of the Postal Laws and Regulations stated that "Congress has not yet, by statute, extended the monopoly of transportation to second, third, or fourth class matter, although admitted to the mails." [16] But these indications are not unambiguous. The language in the Solicitor's opinion was neither directly related to

[14] *See, e.g.*, NMRI's brief at 26-28 (criticizing three 1916 Solicitor's opinions as "poorly reasoned"); appellee's supplemental brief answering NMRI's brief at 16 (asserting that certain testimony of Postmaster General was a "casual explanation").

[15] 1 Opinions of the Solicitor of the Post Office Department (Ops. Sol. POD) 36, 38 (1873). Many of the relevant Solicitors' opinions, as well as excerpts from Postal Laws and Regulations, are reproduced in Appendix A of NMRI's brief.

[16] Postal Laws and Regulations, note following § 705 (1887 ed.). The same language is contained in the note following § 674 of the 1893 edition. The 1879 edition contained a note stating that "[t]he term packet, as used in this and the following sections of the law, is restricted to mailable matter of the first class." Postal Laws and Regulations, note following § 555 (1879 ed.).

the question presented nor by its terms exclusive—it did not say that the monopoly covered *only* what was then included under the rubric of mailable matter of the first class. And the import of the notations in the regulations may be undermined by the fact that the regulations themselves seem at times to have included some third class mailable matter within the term "letter" and to have used the terms "mail-matter" and "letter" interchangeably.[17]

Following these early and concedely somewhat restrictive pronouncements came a number of administrative interpretations that appear difficult to reconcile. On the one hand, three opinions written by the Solicitor in 1916 concluded that the monopoly did extend to addressed circulars of various sorts,[18] a 1933 opinion observed that classification of mail matter into first, second, third, and fourth classes "in no way affects its status under the * * * private express statutes," [19] and the 1934 edition of a Postal Service pamphlet explaining the monopoly stated

[17] All three editions of Postal Laws and Regulations cited in the preceding note listed "circulars" as third class matter but defined them as "printed letter[s]." *See, e.g.*, Postal Laws and Regulations §§ 359, 360 (1887 ed.). The 1879 edition's private express provision first forbids private conveyance of letters and packets and then states, "Nothing herein contained shall be construed as prohibiting any person from receiving and delivering to the nearest post-office or postal car *mail-matter* properly stamped." Postal Laws and Regulations § 555 (1879 ed.) (emphasis added). The 1873 edition of Postal Laws and Regulations also uses the term "mailable matter" in the private express context, *see* § 339, and suggests that circulars may be letters, *see* § 421(11).

[18] 6 Ops. Sol. POD 372, 397, 453 (1916).

[19] 8 Ops. Sol. POD 272, 273 (1933). ATCMU seeks to equate the meaning of "letter" for private express purposes with its meaning when used by Congress to delineate first class matter closed to inspection. As the District Court observed, however, "Congress was not dealing with the same subject or purposes in the classification of letters for rate and inspection purposes and the prohibition of private express for letters." 440 F.Supp. at 1214. Therefore, *in pari materia* construction is inappropriate.

that "under the private express statutes the term 'letters' has a broader significance and may embrace circulars." [20] On the other hand, a 1935 opinion concluded that "circulars advertising the goods of a concern for sale" were not letters for purposes of the Private Express Statutes,[21] another in the same year stated that the monopoly did not extend to "[o]rdinary advertising matter, such as handbills or circulars," [22] and language added to the 1937 edition of the pamphlet referred to previously stated that "advertising handbills or circulars" were not within the letter or spirit of the monopoly.[23]

Some of the apparent inconsistencies noted above seem to have been resolved in 1940 when the Postal Service stated in a new edition of its pamphlet explaining the Private Express Statutes that "unaddressed advertising handbills or circulars" were *not* letters, thus setting forth at least by implication the current rule.[24] Nonetheless, appellant and *amicus curiae* argue that the inconsistencies prior to 1940 strip that rule of any foundation and render the Postal Service undeserving of deference in the definition process. The Service counters that the inconsistencies are more imagined than real. It reads those statements which suggest that advertising materials or circulars are not within the ambit of the term "letter" to refer only to *unaddressed* matter and argues that throughout the relevant period the rule was simply that

[20] United States Post Office Department, The Private Express Statutes 4 (1934).

[21] 8 Ops. Sol. POD 425 (1935).

[22] 8 Ops. Sol. POD 469, 470 (1935).

[23] United States Post Office Department, The Private Express Statutes 13-14 (1937).

[24] United States Post Office Department, The Private Express Statutes 14 (3d ed. 1940). NMRI notes quite correctly that the Service did not via this pamphlet explicitly state that addressed circulars were within the monopoly.

addressed circulars were within the monopoly while unaddressed ones were without it. While this was apparently the rule written into the 1940 pamphlet,[25] neither the language of the earlier statements nor the subsequent editorial change renders the Service's reading of pronouncements made in the preceding decades anything more than a plausible conjecture. For present purposes, however, we do not find this conjectural quality to be fatal. Even if the Service's reading is not completely accurate, we do not believe that whatever ambiguity or inconsistency existed is grounds to set aside the rule that is argued for today.

III

We turn now to the ATCMU contention that the Postal Service definition of "letter" as "a message directed to a specific person or address and recorded in or on a tangible object" is arbitrary and contrary to common sense. As we understand it, the primary argument is simply that the inclusion of addressed advertising circulars is so counter-intuitive as to contradict the maxim that one should give effect to the plain and common meaning of the words Congress chose. We find this contention unpersuasive. We have no doubt that the specificity of the addressee is one indicia of the common understanding of "letterness." The dictionary definition which ATCMU would have us adopt [26] is not to the contrary. Webster states that a letter is "a written or printed message intended for the perusal only of the person or organization to whom it is addressed." [27] In our judgment, the materials at suit fit within this formula. Advertising circulars are *intended* for the perusal of the addressees. While ATCMU is doubtless correct that the senders would not

[25] *Id.*

[26] Appellant's brief at 17-18.

[27] Webster's Third New International Dictionary 1298 (1961).

object if others saw the circulars, the key fact is that the sender's goal is to reach the particular persons who have been identified as most likely to be interested in the advertised products. It is for this that the sender pays. His attitude toward the possibility that others might happen across his circulars is beside the point.

More broadly, we note that any definition is likely to appear arbitrary from some perspective for the simple reason that definitions draw lines—they exclude some matters and include others despite similarities between the two classes. We simply conclude today that the Postal Service has settled upon a reasonable criterion—the presence or absence of an address—and that its definition suffers from no more than the level of arbitrariness which is inevitable.

IV

Appellant's final contention is that the Postal Service's definition runs afoul of the First Amendment and the due process and equal protection clauses of the Constitution. We find these assertions without merit for substantially the reasons relied upon by Judge Parker [28] and see no reason to go beyond his careful analysis.

In sum, we find that the arguments raised by appellant and *amicus curiae* do not warrant invalidation of the definition of "letter" propounded by the Postal Service. For the foregoing reasons, the District Court's judgment is

Affirmed.

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[28] Those reasons are set forth at 440 F.Supp. 1215-1216. In our judgment, this portion of the District Court's opinion deals adequately with our dissenting colleague's concern that the treatment afforded to advertising materials enclosed in newspapers is arbitrary and somehow undermines the entire Postal Service policy. Dissent at 2.

WILKEY, *Circuit Judge, dissenting*: I am in agreement with Judge Wright's recital of the conflicting and shifting ambiguities which have beset both the statutory definition and the Postal Service's interpretation of the word "letter" for the purpose of defining the Postal Service's monopoly. I am in thorough agreement with the statements that "the Postal Service's interpretations and comments regarding the content of the term have often seemed ambiguous and inconsistent," (pp. 5-6) and "the most that can be said about the administrative history is that it is something of a muddle." (P. 9)

I dissent from the court's affirmance of the Postal Service's current interpretation of the word "letter" because, in my reading of the lengthy details back of the majority opinion's terse summary of 150 years of statute and statutory interpretation, there emerges only one consistent theme from the Postal Service—it has always latched onto whatever interpretation of the word "letter" which would give it the most extensive monopoly power which Congress at that time seemed disposed to allow.

Not only do I find this total lack of any intellectual consistency offensive, especially when coming from a supposed-to-be responsible government agency, but there is a very practical reason why I think this court should refuse to approve the Postal Service's current interpretation. If we decline to include the advertising flyers which the Postal Service is intent upon embracing within the word "letter" so as to give its monopoly the most expansive scope, we may then force the Postal Service to go to Congress to define accurately the desired postal monopoly scope. That definition, the desired scope of the Postal Service's monopoly, is entirely a question of public policy, properly to be determined solely by Congress, and this court should not countenance the Postal Service's power and revenue grabbing simply because the statute, the statutory history, and the agency's own administrative interpretations are conflicting and obscure.

On the most important substantive point I do differ with my two colleagues. At the outset the majority opinion points out that the Postal Service "has determined by regulation that the term 'letter' in the statutory proscription encompasses any 'message *directed to a specific person or address* and recorded in or on a tangible object' —a definition which clearly includes addressed advertising materials. This litigation turns on the validity of that definition." (Pp. 3-4) And, my colleagues conclude "that the Postal Service has settled upon a reasonable criterion—the presence or absence of an address—and that its definition suffers from no more than the level of arbitrarines which is inevitable." (P. 13)

The appellants have strenuously argued—and the majority opinion nowhere mentions or refutes this—that the very advertising circulars or flyers which are the subject matter of the dispute are frequently included as flyers inserted in newspapers which are delivered to specific named addressees at specific residential or business addresses. These flyers or circulars not only have the same text, they are physically the same product of ink and paper, the only difference being that the address in one instance is imprinted on the outside of the newspaper and in the other instance on the envelope containing only the circular or the circular itself. There are numerous examples of this in the record, and we were shown samples at oral argument.

I can see no legal difference in these three instances—name and address printed on the circular itself, on the envelope containing the circular, or on the newspaper containing the circular. Apparently reluctant to take on the powerful press establishment, the Postal Service says it has a monopoly on the first two but not the third. There is no valid distinction, and so the criterion on which my colleagues say this litigation turns, the presence or absence of an address, has no validity whatsoever.

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1065—September Term, 1978

D.C. Civil Action 76-1768

ASSOCIATED THIRD CLASS MAIL USERS, APPELLANT

v.

UNITED STATES POSTAL SERVICE ET AL.

Appeal from the United States District Court for the District of Columbia.

BEFORE: WRIGHT, Chief Judge, WILKEY, Circuit Judge, and FLANNERY,* United States District Judge for the District of Columbia.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam For the Court.

GEORGE A. FISHER, *Clerk*.

Date: March 9, 1979

Opinion for the Court filed by Chief Judge Wright.

Dissenting opinion filed by Circuit Judge Wilkey.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1065—September Term, 1978

D.C. Civil Action 76-1768

ASSOCIATED THIRD CLASS MAIL USERS, APPELLANT

v.

UNITED STATES POSTAL SERVICE ET AL.

[United States Court of Appeals for the District of Columbia Circuit, Filed April 3, 1979, George A. Fisher]

BEFORE: WRIGHT, Chief Judge; WILKEY, Circuit Judge; and FLANNERY*, Judge, United State District Court for the District of Columbia.

ORDER

Upon consideration of the petition for rehearing filed by appellant Associated Third Class Mail Users, it is

ORDERED, by the Court, that appellant's aforesaid petition for rehearing is denied.

Per curiam.

For the Court:

GEORGE A. FISHER,
Clerk.

* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1065—September Term, 1978

D.C. Civil Action 76-1768

ASSOCIATED THIRD CLASS MAIL USERS, APPELLANT

v.

UNITED STATES POSTAL SERVICE ET AL.

[United States Court of Appeals for the District of Columbia Circuit, Filed April 3, 1979, George A. Fisher]

BEFORE: WRIGHT, Chief Judge; TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB, and WILKEY, Circuit Judges.

ORDER

The suggestion for rehearing *en banc* filed by appellant Associated Third Class Mail Users, having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam.

For the Court:

GEORGE A. FISHER, *Clerk.*

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

D.C. Civil Action 76-1768

ASSOCIATED THIRD CLASS MAIL USERS, PLAINTIFF,

v.

UNITED STATES POSTAL SERVICE, ET AL., DEFENDANTS.

[Filed November 29, 1977, James F. Davey, Clerk]

MEMORANDUM OPINION

Barrington D. Parker, District Judge:

The issue presented in this proceeding is whether advertisements directed in identical form to specific persons or residences are validly subject to the United States Postal Service monopoly over letter delivery. Plaintiff Associated Third Class Mail Users ("Mail Users") has brought suit against the United States Postal Service. Mail Users seeks a declaration that 39 C.F.R. § 310.1-.7 (1977), postal regulations enforcing the monopoly, are invalid or unconstitutional either in their entirety or insofar as they define the term "letter" to include such advertisements.[1] Plaintiff additionally seeks an injunction restraining the Postal Service from enforcing these regulations. The National Association of Letter Carriers, the exclusive bargaining representative for all nonsupervisory Postal Service employees in the city letter carrier craft, has been permitted to intervene as a party defendant.

[1] 39 C.F.R. § 310.1(a) provides in relevant part:

> "Letter" is a message directed to a specific person or address and recorded in or on a tangible object, subject to the following:
>
> . . . .
>
> (3) A message is directed to a "specific person or address" when, for example, it is directed to a named or identifiable individual, organization, or official, or when it is directed to a specific place.
>
> . . . .

[Footnote continued on page 19a]

This proceeding arises under the postal laws of the United States, 18 U.S.C. § 1696 and 39 U.S.C. §§ 601-606 ("Private Express Statutes"); jurisdiction rests on 39 U.S.C. § 409(a) and 28 U.S.C. § 1339.

There are no material facts in dispute and the parties have filed cross-motions for summary judgment. After consideration of the memoranda of points and authorities, the affidavits and the oral argument of counsel, the Court concludes that the defendants are entitled to judgment and that the complaint of Mail Users should be dismissed.

I.

Mail Users is a District of Columbia trade association consisting of more than 600 organizations which distribute so-called "public advertisements" through the mail at third class rates. Plaintiff's pleading defines such an advertisement to be a "printed message to the public directed in identical form to selected persons or addresses."[2] To avoid increasing postal rates, Mail Users desires to develop a private system of carriage and delivery of "public advertisements."

The current Private Express Statutes and regulations determine the legality of private carriage systems. Title

[1] [Continued]

> (6) Identical messages directed to more than one specific person or address . . . constitute separate letters.
>
> Under subsection (a)(7), telegrams, checks, newspapers, periodicals and books or catalogs of 24 or more bound pages are not considered to be "letters."

[2] Complaint, ¶ 6.

18 U.S.C. § 1696 provides criminal penalties for whoever establishes or uses a private express. The companion civil statute, 39 U.S.C. §§ 601-606, approves private carriage of letters that display the proper amount of postage cancelled in ink and authorizes the Postal Service to search for and seize illegally transported letters. Although the Statutes do not define the term "letter," the Postal Service has defined that word to mean a "message directed to a specific person or address and recorded in or on a tangible object . . . ." and has specified that "[i]dentical messages directed to more than one specific person or address . . . constitute separate letters." [3]

Mail Users readily admits that "public advertisements" are letters under the regulatory scheme and are therefore subject to the postal monopoly. However, plaintiff contests the validity of this outcome, because its members' advertisements are allegedly directed to the public at large rather than being the private communications connoted by the term "letters." Addressing, according to Mail Users, is merely a convenience to direct advertisements to various consumer markets.

Despite plaintiff's representations, addressing is the most important characteristic of "public advertisements." Over 67% of third class mail is addressed to a specific member of a household.[4] While Mail Users members are free to develop a private delivery service for unaddressed advertisements, they have chosen to bring this action instead. Therefore, the focal question here is whether the distinction between addressed and unaddressed circulars under the Private Express Statutes and regulations is valid as a matter of law.

[3] *See* note 1 *supra.*

[4] Affidavit of John R. Wargo, ¶ 12c, Motion of the Postal Service for Summary Judgment.

In support of its motion for summary judgment, Mail Users refers the Court to legislative, judicial and administrative interpretations of the term "letter" in an attempt to prove that the regulatory distinction is invalid. In the alternative, plaintiff argues that the regulations violate its members' constitutional rights to due process, free speech and equal protection of the laws.

II.

As a preliminary matter, the Court notes that, contrary to the plaintiff's assertion, the Postal Service did not act ultra vires in promulgating the private express regulations under 18 U.S.C. § 1696. The service is specifically authorized under 39 U.S.C. § 401(2) to develop regulations to further the private express objectives of Title 39. While section 1696 is not a part of Title 39, that section is a substantive Private Express Statute, separated from the others only when United States criminal provisions were codified into Title 18 in 1909. Therefore, the rulemaking authority of 39 U.S.C. § 401(2) also extends to § 1696.[5]

Plaintiff Mail Users first argues that the Postal Service ignored legislative history in defining the term "letter" to include "public advertisements." This position has little, if any, merit. While the status of such messages in the postal monopoly legislation of the eighteenth and early nineteenth centuries is uncertain, Congress specifically included advertising circulars in 1845 by extending the private express prohibition to letters, packets or "other matter properly transmittable in the United States

[5] This conclusion is supported by § 7 of the Postal Reorganization Act of 1970, P.L. 91-375, 84 Stat. 783, in which Congress ordered the Board of Governors of the Postal Service to conduct a study of the "restrictions on the private carriage of letters and packets contained in Chapter 6 of Title 39 . . . and sections 1694-1696 of Title 18, United States Code, and the *regulations established and administered under these laws.*" (emphasis added)

mail, except newspapers, pamphlets, magazines and periodicals." Act of March 3, 1845, § 9, 5 Stat. 735. In 1872, when Congress redrafted the statute and returned to earlier language prohibiting private express of only letters and packets, Act of June 8, 1872, § 228, 17 Stat. 311, advertisements were not thereby removed from the monopoly because the change was part of a general recodification of the law in 1872 to weed out redundancy. Given that substantive changes in the postal provisions were well-documented, the unheralded change in phrasing in the Private Express Statutes could only have been a simplification.[6] Since the statutes have remained relatively unchanged since 1872, the legislative history shows that communications such as "public advertisements" are still letters for private express purposes.

In a related vein, Mail Users argues that the term "letter" in the private carriage provisions must be read *in pari materia* with that term as used by Congress to indicate first class mail closed to postal inspection. This argument is inappropriate here since Congress was not dealing with the same subject or purposes in the classification of letters for rate and inspection purposes and the prohibition of private express for letters. Indeed, in refusing jurisdiction over the Private Express Statutes, the Postal Rate Commission found that Congress has recognized and approved the "dual construction" of the term "letter." [7]

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[6] By this point in time, "letter" presumably had an accepted usage for postal monopoly purposes, since the 1872 Act did not even include the newspaper and periodicals exemption. Ironically, this fact shows that plaintiff's argument here proves too much, since the logic erroneously leads to the conclusion that Congress meant the monopoly in 1872 to cover those traditionally excluded items as well as advertisements.

[7] United States Postal Rate Commission, Statement of General Policy Determining Lack of Jurisdiction and Order Terminating Proceeding 16-19 (Aug. 6, 1976).

Plaintiff's second major argument is that judicial interpretation of the term "letter" would exclude "public advertisements." The case law, however, supports the opposite proposition. In *United States* v. *Bromley*, 53 U.S. (12 How.) 87 (1851), the Supreme Court held that an unsealed order for tobacco was a letter subject to the postal monopoly. In light of the purpose of the monopoly to protect postal revenue, the Court rejected the argument that merchandise orders were not letters, noting that "it may be doubted whether any other subject can be named on which more letters are written and forwarded in the mail." *Id.* at 97. Mail Users attempts to distinguish *Bromley* on the grounds that a merchandise order is more individualized than a "public advertisement." While true, this distinction does not override the *Bromley* economic reasoning, for advertisements today contribute one and a half billion dollars of revenue to the Postal Service per year.

In *National Association of Letter Carriers* v. *Independent Postal System of America, Inc.*, 336 F. Supp. 804 (W.D. Okla. 1971), *aff'd*, 470 F.2d 265 (10th Cir. 1972) (hereinafter cited as *IPSA*), the district court enjoined an independent postal system from delivering addressed and privately stamped Christmas cards to customers of participating businesses, finding that the cards were letters subject to private express prohibitions.[8] Plaintiff's arguments against the precedential value of the *IPSA* case are strained at best. Given that the Independent Postal System restricted its delivery to commercial cards, which are not markedly more private than average advertisements, the two cases are not distinguishable on the basis of the nature of the mail at issue. Plaintiff's assertion that the *IPSA* decision turned on the physical simi-

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[8] Though 39 C.F.R. § 310.1(a) had not yet been promulgated, the Court looked to regulations which defined "letter" in an almost identical way. 39 C.F.R. § 152.2 as retained in an uncodified regulation by 35 Fed. Reg. 19399 (1970).

larity of the proposed independent system to the United States Postal Service lacks merit. While the court did describe similarities such as utilization of uniformed postmen and stamps, the actual decision in no way rests on the physical attributes of competition. Even if *IPSA* did turn on this issue, Mail Users here offers no details of its proposed private delivery service in order to distinguish it from the aborted Independent Postal System of America.

Thirdly, Mail Users argues that the administrative interpretation of the term "letter" has been so inconsistent as to invalidate the regulatory definition. This position cannot withstand legal scrutiny. While the Postal Board of Governors did report to Congress that administration of the Private Express Statutes could be improved,[9] the Court will not suspend the rulemaking authority of the Postal Service on the basis of that announcement alone. Nor will the Court invalidate 39 C.F.R. § 310.1(a) on the basis of an allegedly "illogical flip-flop" by the Service in promulgating the rule. The agency originally proposed to define the term "letter" to include all items but telegrams, and to suspend operation of the Private Express Statutes for newspapers, periodicals, catalogs and checks. In response to comments, the Service rejected the suspension approach to exclude items by definition. This process does not mark inconsistency within the agency, but rather compliance with rulemaking procedure under the Administrative Procedure Act. At any rate, the substantive coverage of the postal monopoly over "public advertisements" was not changed as the rule was promulgated.

As an alternative to the legislative, judicial and administrative history arguments, Mail Users presents several

[9] House Comm. on Post Office and Civil Service, 93rd Cong., 1st Sess., Statutes Restricting Private Carriage of Mail and Their Administration 13 (Comm. Print 1973).

constitutional reasons against inclusion of "public advertisements" in the postal monopoly. All are lacking in merit. Plaintiff claims that the regulations are so arbitrary as to violate its members' Fifth Amendment right to due process, because the "minor inconvenience" of addressing cannot rationally affect whether an advertisement is a letter. Plaintiff itself defeats this reasoning by demonstrating that addressing is crucial to its members' advertising goals.

Second, Mail Users claims that the prohibition of private express for "public advertisements" imposes an impermissible burden on its members' free speech. The restraint plaintiff complains of, however, is no different than that placed on any person subject to the Private Express Statutes, which have long been found constitutional. *Ex Parte Jackson*, 96 U.S. 877 (1878). In *United States* v. *Black*, 418 F. Supp. 378 (D. Kan. 1976), the defendants, who had delivered statements of medical services received to a doctor's patients, contended that if Congress could restrict delivery of letters to the Postal Service, then future postal rate increases could restrict the ability of poor people and small businesses to communicate by mail. The district court dismissed these contentions as being "so speculative and filled with conjecture as to deserve little or no comment." *Id.* at 382. The First Amendment claims of Mail Users in the instant case are no less speculative.

Finally, Mail Users claims that its members have been denied equal protection of the laws because the exclusion of newspaper supplements and addressed catalogs over 24 pages long from a monopoly that includes "public advertisements" bears no relation to the postal revenue goals.[10] However, these members are free to use any type of advertisement to reach potential customers, including

[10] *See* note 1 *supra*.

newspaper supplements and catalogs. At any rate, these classifications are based on reasonable distinctions. Congress has traditionally exempted newspapers and periodicals from the monopoly to avoid restrictions on the press. At some point catalogs become too large to fit into the common usage of the term "letter"; 24 pages, a figure suggested to the Postal Service by Mail Users, is not unreasonable.

III.

From *Bromley* to *IPSA*, the Congress, the courts and the Postal Service have all understood the Private Express Statutes to prohibit the private carriage of messages such as "public advertisements." There is no constitutional infirmity in such an interpretation. Therefore, there being no genuine issue of material fact and the defendants being entitled to judgment as a matter of law, the Court enters summary judgment in favor of defendant United States Postal Service and defendant-intervenor National Association of Letter Carriers and against Associated Third Class Mail Users. An appropriate order will be entered.

Entered: November 29, 1977

BARRINGTON D. PARKER
United States District Judge

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APPENDIX F

Title 39, Code of Federal Regulations

SUBCHAPTER E—RESTRICTIONS ON PRIVATE CARRIAGE OF LETTERS

PART 310—ENFORCEMENT OF THE PRIVATE EXPRESS STATUTES

Sec.

AUTHORITY: 39 U.S.C. 401, 404, 601-606; 18 U.S.C. 1693-1699, 1724.

SOURCE: 39 FR 33211, Sept. 16, 1974, unless otherwise noted.

§ 310.1 Definitions.

(a) "Letter" is a message directed to a specific person or address and recorded in or on a tangible object, subject to the following:

(1) Tangible objects used for letters include, but are not limited to, paper (including paper in sheet or card form), recording disks, and magnetic tapes.

(2) "Message" means any information or intelligence that can be recorded as described in paragraph (a) (4) of this section.

(3) A message is directed to a "specific person or address" when, for example, it is directed to a named or identifiable individual, organization, or official, or when it is directed to a specific place.

(4) Methods by which messages are recorded on tangible objects include, but are not limited to, the use of written or printed characters, drawings, holes, or orientations of magnetic particles in a manner having a predetermined significance.

(5) Whether a tangible object bears a message is to be determined on an objective basis without regard to the intended or actual use made of the object sent.

(6) Identical messages directed to more than one specific person or address or separately directed to the same person or address constitute separate letters.

(7) The following are not letters within the meaning of these regulations: [1]

(i) Telegrams.

(ii) Checks, drafts, promissory notes, bonds, other negotiable and non-negotiable financial instruments, stock certificates, other securities, insurance policies, and title policies when shipped to, from, or between financial institutions.

(A) As used above, "checks" and "drafts" include documents intrinsically related to and regularly accompanying the movement of checks or drafts within the banking system. "Checks" do not include materials accompanying the movement of checks to financial institutions from persons who are not financial institutions, or vice versa, except such materials as would qualify under § 310.3(a) if "checks" were treated as cargo. Specifically, for example, "checks" do not include bank statements

[1] Several of the items enumerated in this paragraph (a)(7) do not self-evidently lie outside of the definition of "letter". To the extent, however, that there is any question whether these items may properly be excluded by definition, the Postal Service has determined by adoption of these regulations that the restrictions of the Private Express Statutes are suspended pursuant to 39 U.S.C. 601(b).

sent to depositors showing deposits, debits, and account balances.

(B) As used above, "financial institutions" means:

(1) As to checks and drafts: banks, savings banks, savings and loan institutions, credit unions, and their offices, affiliates, and facilities.

(2) As to other instruments: institutions performing functions involving the bulk generation, clearance, and transfer of such instruments.

(iii) Abstracts of title, mortgages, deeds, leases, articles of incorporation, papers filed in lawsuits or formal quasijudicial proceedings, and orders of court.

(iv) Newspapers and periodicals.

(v) Books and catalogs consisting of 24 or more bound pages with at least 22 printed, and telephone directories.

(vi) Identical letters sent in bulk to a single address by a printer or other supplier of letters for third persons.

(vii) Letters sent in bulk to or from storage or to destruction or as part of a household or business relocation.

(b) "Packet" means two or more letters under one cover or otherwise bound together. As used in these regulations, unless the context otherwise requires, "letter" or "letters" includes "packet" or "packets".

(c) "Person" means an individual, corporation, association, partnership, governmental agency, or other legal entity.

(d) "Post routes" are routes on which mail is carried by the Postal Service, and includes post roads as defined in 39 U.S.C. 5003, as follows:

(1) The waters of the United States, during the time the mail is carried thereon;

(2) Railroads or parts of railroads and air routes in operation;

(3) Canals, during the time the mail is carried thereon;

(4) Public roads, highways, and toll roads during the time the mail is carried thereon; and

(5) Letter-carrier routes established for the collection and delivery of mail.

(e) "Private carriage", "private carrier", and terms of similar import used in connection with the Private Express Statutes or these regulations mean carriage by anyone other than the Postal Service, regardless of any meaning ascribed to similar terms under other bodies of law or regulation.

(f) The "Private Express Statutes" are set forth in 18 U.S.C. 1693-1699 and 1724 and 39 U.S.C. 601-606 (1970).

[39 FR 33211, Sept. 16, 1974; 39 FR 36114, Oct. 8, 1974, as amended at 40 FR 23295, May 29, 1975]

§ 310.2 Unlawful carriage of letters.

(a) It is generally unlawful under the Private Express Statutes for any person other than the Postal Service in any manner to send or carry a letter on a post route or in any manner to cause or assist such activity. Violation may result in injunction, fine or imprisonment or both and payment of postage lost as a result of the illegal activity (see § 310.5).

(b) Activity described in paragraph (a) of this section is lawful with respect to a letter if—

(1) It is enclosed in an envelope or other suitable cover;

(2) The amount of postage which would have been charged on the letter if it had been sent through the

Postal Service is paid by stamps, or postage meter stamps, on the cover or by other methods approved by the Postal Service;

(3) The name and address of the person for whom the letter is intended appear on the cover;

(4) The cover is so sealed that the letter cannot be taken from it without defacing the cover;

(5) Any stamps on the cover are canceled in ink by the sender; and

(6) The date of the letter, or of its transmission or receipt by the carrier, is endorsed on the cover in ink by the sender or carrier, as appropriate.

(c) The Postal Service may suspend the operation of any part of paragraph (b) of this section where the public interest requires the suspension.

(d) Activity described in paragraph (a) of this section is permitted with respect to letters which—

(1) Relate to some part of the cargo of, or to some article carried at the same time by, the conveyance carrying it (see § 310.3(a));

(2) Are sent by or addressed to the carrier (see § 310.3(b));

(3) Are conveyed or transmitted without compensation (see § 310.3(c));

(4) Are conveyed or transmitted by special messenger employed for the particular occasion only, provided that not more than twenty-five such letters are conveyed or transmitted by such special messenger (see § 310.3(d)); or

(5) Are carried prior or subsequent to mailing (see § 310.3(e)).

§ 310.3 Exceptions.

(a) *Cargo.* The sending or carrying of letters is permissible if they accompany and relate exclusively to some part of the cargo.

(b) *Letters of the carrier.* (1) The sending or carrying of letters is permissible if they are sent by or addressed to the individual carrying them or if they are sent by or addressed to an officer or employee of a carrier on the current business of the carrier (i.e., in his capacity as an officer or employee).

(2) The fact that the individual performing the carriage may be an officer or employee of the carrier for certain purposes does not necessarily mean that he is an officer or employee for purposes of this exception. The following factors bear on qualification for the exception: the carrying employee is employed for a substantial time, if not full-time (letters must not be privately carried by casual employees); the carrying employee carries no matter for other senders; the carrying employee is a regular salaried employee and shares in all privileges enjoyed by other regular employees (including employees not engaged primarily in the letter-carrying function), including but not limited to salary, annual vacation time, absence allowed for illness, health benefits, workmen's compensation insurance, and retirement benefits.

(3) Separately incorporated carriers are separate entities for purposes of this exception, regardless of any subsidiary, ownership, or leasing arrangement. When, however, two concerns jointly operate an enterprise with joint employees and share directly in its revenues and expenses, either of the concerns may carry the letters of the joint enterprise.

(c) *Private hands without compensation.* The sending or carrying of letters is permissible if no charge for carriage is made by the carrier. However, a person engaged in the transportation of goods or persons for hire does not fall within the exception merely by carrying letters free of charge for customers whom he does charge for the carriage of goods or persons.

(d) *Special messenger.* (1) The use of a special messenger employed for the particular occasion only is permissible to transmit letters if not more than twenty-five letters are involved. The permission granted under this exception is restricted to use of messenger service on an infrequent, irregular basis by the sender or addressee of the message.

(2) A special messenger is a person who, at the request of either the sender or the addressee, picks up a letter from the sender's home or place of business and carries it to the addressees home or place of business, but a messenger or carrier operating regularly between fixed points is not a special messenger.

(e) *Carriage prior or subsequent to mailing.* (1) The private sending or carrying of unopened letters which enter the mail stream at some point between their origin and destination is permissible. The origin of a letter is the residence or place of business of the sender; the destination of a letter is the residence or place of business of the addressee.

(2) Examples of permitted activity are the pickup and carriage of letters which are delivered to post offices for mailing; the pickup and carriage of letters at post offices for delivery to addressees; and the bulk shipment of individually addressed letters ultimately carried by the Postal Service.

§ 310.4 Responsibility of carriers.

Private carriers are cautioned to make sure that their carriage of matter is lawful within the definition, exceptions, suspension, and conditions contained in this

part and in Part 320. They should take reasonable measures to inform their customers of the contents of these regulations so that only proper matter is tendered to them for carriage. Carriers should desist from carrying any matter when the form of shipment, identity of sender or recipient, or any other information reasonably accessible to them indicates that matter tendered to them for carriage is not proper under these regulations.

§ 310.5 Payment of postage on violation.

(a) Upon discovery of activity made unlawful by the Private Express Statutes, the Postal Service may require any person or persons who engage in, cause, or assist such activity to pay an amount or amounts not exceeding the total postage to which it would have been entitled had it carried the letters between their origin and destination.

(b) The amount equal to postage will be due and payable not later than 15 days after receipt of formal demand from the Inspection Service unless an appeal is taken to the Judicial Officer Department in accordance with rules of procedure set out in Part 959 of this chapter.

(c) Refusal to pay an unappealed demand or a demand that becomes final after appeal will subject the violator to civil suit by the Postal Service to collect the amount equal to postage.

(d) The payment of amounts equal to postage on violation shall in no way limit other actions to enforce the Private Express Statutes by civil or criminal proceedings.

§ 310.6 Advisory opinions.

An advisory opinion on any question arising under this part and Part 320 may be obtained by writing the Assistant General Counsel, Opinions Division, United States

Postal Service, Washington, D.C. 20260. Final opinions will be available for inspection by the public in the Library of the United States Postal Service, and copies of individual opinions may be obtained upon payment of charges for duplicating services.

§ 310.7 Amendment of regulations.

Amendments of the regulations in this part and in Part 320 may be made only in accordance with the rulemaking provisions of the Administrative Procedure Act.

[40 FR 23295, May 29, 1975]

In The

Supreme Court of the United States

October Term, 1978

No. 78-1820

ASSOCIATED THIRD CLASS MAIL USERS,

Petitioner,

v.

UNITED STATES POSTAL SERVICE.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1820

ASSOCIATED THIRD CLASS MAIL USERS,

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v.

UNITED STATES POSTAL SERVICE

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Intervenor-respondent, National Association of Letter Carriers, AFL-CIO, (herein "NALC")* submits this brief in

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*The District Court granted NALC's motion to intervene in this case by order, dated January 5, 1977. NALC appeared in proceedings before both the District Court and Court of Appeals. NALC is the exclusive collective bargaining representative for all nonsupervisory Postal Service employees in the city letter carrier craft.

opposition to the petition filed by Associated Third Class Mail Users for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is set forth at pages 1a-14a of the petition. The Memorandum Opinion of the District Court is reported at 440 F.Supp. 1211 and is set forth at pages 18a-26a of the petition.

QUESTIONS PRESENTED

1. Whether the Courts below erred in ruling that the United States Postal Service has reasonably interpreted its statutory monopoly over the conveyance of "letters" so as to include paper advertisements directed to specific persons or to specific addresses?

2. Whether the Courts below erred in ruling that the application of the statutory postal monopoly to the conveyance of specifically addressed paper advertisements does not render the Private Express Statutes, or regulations promulgated thereunder, void under the First and Fifth Amendments to the United States Constitution?

STATEMENT OF THE CASE

The so-called Private Express Statutes, presently codified at 39 U.S.C. §§601-606 and 18 U.S.C. §§1693-1699, 1725, grant to the United States Postal Service the exclusive right to carry "letters" for others. Pursuant to its rule-making authority under 39 U.S.C. §401(2), the Postal Service has promulgated regulations interpreting the scope of its monopoly. 39 C.F.R. §310.1 et seq. The regulations define a "letter" subject to the monopoly

as "a message directed to a specific person or address and recorded in or on a tangible object", 39 C.F.R. §310.1(a)* and further specify that "identical messages directed to more than one specific person or address...constitute separate letters", 39 C.F.R. §310.1(a)(6). This definition includes printed advertising material which is specifically addressed to persons and/or locations.

Petitioner, Associated Third Class Mail Users (herein "petitioner" or "ATCMU") is a trade association consisting of various organizations which "distribute through the mails substantial numbers of paper items for advertising and merchandising purposes" (Complaint ¶1). Under the statutory and regulatory scheme described above, ATCMU's members are free to utilize at least four means of distributing their advertising materials. First, the paper advertisements may be sent through the Postal Service as third class mail. Second, ATCMU members may utilize alternative distribution systems whenever their material is not specifically addressed. Third, specifically addressed advertising material may be conveyed by private deliverers provided that, pursuant to 39 U.S.C. §§601, the materials display proper postage cancelled in ink. Finally, ATCMU members may invoke the special exception provided by the regulations for "newspapers and periodicals" so as to arrange delivery through insertion of their material into a newspaper or periodical. 39 C.F.R. §310.1(a)(7)(iv).

On September 21, 1976, petitioner filed its complaint herein, seeking

*39 C.F.R. §310.1(a)(3) provides that "a message is directed to 'a specific person or address' when, for example, it is directed to a named or identified individual, organization, or official, or when it is directed to a specific place."

declaratory and injunctive relief invalidating the foregoing regulations in their entirety, or as applied to specifically addressed advertisements. Significantly, the complaint does not allege that the Postal Service's regulatory scheme prevents ATCMU members from distributing paper advertisements. Petitioner's sole claimed injury is that the regulations prohibit utilization of allegedly less expensive alternative methods of delivery.

There being no dispute over material facts, the District Court granted summary judgment to the Postal Service and NALC in a memorandum and order, dated November 29, 1977. Judge Parker ruled that (1) specifically addressed paper advertisements are "letters" within the Private Express Statutes, and that (2) the application of the postal monopoly to such advertisements did not render the statutes

or regulations unconstitutional. The Court of Appeals affirmed both rulings in a decision dated March 9, 1979. On April 3, 1979, the Court denied ATCMU's petition for rehearing.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' Construction of the Private Express Statutes is Clearly Correct

In rejecting petitioner's statutory claim, the Court below held that the Private Express Statutes permit the Postal Service to treat specifically addressed advertising circulars as "letters" within the postal monopoly. The Court based its decision on a thorough, historical analysis of the development of the present statutory language and its past interpretations. This analysis entailed a review of a wide variety of legislative and administrative materials, predating the presently effec-

tive Postal Reorganization Act of 1970, which the parties had marshalled in support of their positions. This material included the relevant provisions of every postal statute from the Act of 1710, which established the postal monopoly in the colonial period through the 1872 codification of the postal laws which established the modern definition of the monopoly ("letters and packets"); the provisions of amendments to the postal statutes enacted after 1872; and legislative reports, Post Office Department regulations, opinions of solicitors of the Post Office Department; and Postal Service publications issued during the 19th and 20th centuries.*

The Court's decision reflects its careful evaluation of the historical

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*A list of the historical materials cited to the Court of Appeals is set forth in Appendix A.

evidence. It found that the postal statutes prior to 1872 clearly encompassed addressed advertising circulars, that the 1872 revision represented only an attempt to codify those prior laws, without substantive alteration, and that no evidence exists that the 1872 Congress deliberately intended to contract the scope of the monopoly. Accordingly, the Court found that "the legislative text and history...tends to favor the Postal Service." (Appendix A to Petition, p. 7a). The Court also examined the pronouncements of Postal Solicitors and publications since the 1872 codification and concluded that the administrative history of the Private Express Statutes does not furnish a basis for holding them inapplicable to advertising circulars. (Id. p. 11 a).

In its present petition ATCMU does not challenge the accuracy of the

Court's assessment of the historical evidence. Instead, it merely reiterates its contention that to treat advertising circulars as "letters" is contrary to common usage since advertisements contain public rather than private messages. The Court of Appeals rightly held this contention unpersuasive where advertisements are specifically addressed to persons or locations. It noted that the specificity of an addressee is a common sense indicium of "letterness" and that the messages contained in addressed advertisements are primarily intended for the recipient, who has been identified as most likely to be interested in the advertised product.

The Court of Appeals' reasoning is directly supported by the pre-existing case law, United States v. Bromley, 53 U.S. (12 How.) 87 (1851) [holding unsealed, commercial orders letters within

the postal monopoly]; National Association of Letter Carriers v. Independent Postal System of America, 336 F.Supp. 804 (W.D. Okla. 1971), aff'd 470 F.2d 265 (10th Cir. 1972) [holding Christmas cards from business or commercial concerns, containing no personal message and intended for mass delivery, to be letters when addressed to a particular person]; as well as by standard dictionary definitions of "letter", see, e.g. Webster's New International Dictionary, Second Edition, Unabridged, 1961; The Random House Dictionary of the English Language (New York 1973), Funk & Wagnall's Standard College Dictionary (New York 1968).

ATCMU cites no conflicting case law and relies entirely on the hypothetical dialogue of "the Joneses" to set the limits of the postal monopoly. In light of the clear absence of any statutory, judicial,

or legislative authority supporting ATCMU's position, the well reasoned decision of the Court of Appeals should be permitted to stand and the petition for review should be denied.

II. Petitioner's Constitutional Claims Are Frivolous

The Courts have long upheld the constitutionality of the Private Express Statutes as an appropriate exercise of Congressional power. See, Ex Parte Jackson, 96 U.S. 877 (1877); United States Postal Service v. Brennan, 574 F.2d 712 (2d Cir. 1978), cert. den. 58 L.Ed. 2d 51 (1979); United States v. Black, 418 F.Supp. 378 (D. Kan. 1976) aff'd 569 F.2d 1111 (10th Cir.) cert. den. 435 U.S. 944 (1978). Petitioner does not challenge this basic concept.

ATCMU does claim that the distinctions drawn by the Postal Service

regulations between addressed advertisements, on the one hand, and unaddressed advertisements, newspapers, and catalogues, on the other, are so arbitrary and irrational as to violate the due process and equal protection guarantees of the Fifth Amendment. But this contention is wholly specious. As the Second Circuit recently observed in rejecting an identical equal protection challenge to the Private Express laws, "the classification is not directed against persons; rather it is based upon types of mail....Obviously the distinction between types of mail is not invidious." United States Postal Service v. Brennan, supra, 574 F.2d at 717. ATCMU members are in no different position than any other advertisers who wish to arrange for delivery of paper circulars. Since the Postal Service regulations do not accord differential treatment to persons similarly situated, they cannot be challenged on

equal protection grounds.* Reed v. Reed, 404 U.S. 71 (1971).

Petitioner's First Amendment claim is equally baseless. The Postal regulations do not prevent distribution of its members advertisements. ATCMU members are free to utilize the mails or any of the other methods recognized by the Statutes. Given these alternative delivery methods, petitioner cannot possibly demonstrate a denial of its members' freedom of speech. See Rockville Reminder, Inc. v. United States Postal Service, 480 F.2d 4, 7-8 (2d Cir. 1973); United States

*Moreover, the distinction between addressed and unaddressed advertising is hardly so irrational as to raise a due process issue. That distinction simply reflects the Postal Service's need for a clear-cut, administerable test for "letterness" which is consistent with the text and history of the Private Express Laws. Indeed, petitioner's suggestion that letters be distinguished from non-letters on the basis of the privacy of their contents (Petition, p. 7) would seem to raise far graver risks of constitutional infirmity.

v. Black, supra, 418 F.Supp. at 382; see also, Council of Greenburgh Civic Associations v. USPS, 586 F.2d 936, 938-9 (2d Cir. 1978) (Kaufman, J. concurring). Moreover, the restrictions imposed on delivery of addressed advertisements are the same restrictions imposed on all other types of mail subject to the postal monopoly. Petitioner's First Amendment theory is thus utterly irreconcilable with the established constitutionality of the Private Express Statutes.

III. The Issues Raised Herein Do Not Merit Review by this Court

Petitioner seeks to attribute national significance to its claims by citing allegedly inflated increases in postal rates for bulk third class mail, the Postal Service's so-called "power grabbing", and the imagined impact of the lower Court's ruling on "the raging controversy over whether the postal monopoly applies to 'electronic mail'". The electronic mail question -- which arises from

proposed Postal regulations -- is utterly irrelevant to the issues which have been litigated here. Petitioner's complaint did not allege -- nor has it since claimed -- that its members seek to utilize electronic communications subject to postal regulation. In any event, as the Second Circuit observed in the Brennan case, the various considerations of economic and postal policy cited by petitioner are "a matter for the Congress and not the courts." 574 F.2d at 717.*

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*The scope of the Private Express Statutes is a matter of continuing congressional concern. For example, the Subcommittee on Postal Operations and Services of the House of Representatives Post Office and Civil Service Committee is presently conducting oversight hearings on the Private Express Statutes. See Federal Times, p. 1, May 14, 1979. At least two bills are presently pending in the House which would create exceptions to the Statutes for so-called "time-sensitive" mail. H.R. 3669 and H.R. 4082. Moreover, President Carter is expected in the immediate future to issue a policy memorandum defining the Postal Service's role in the electronic communications field. Telecommunications Reports Vol. 45, No. 23 June 11, 1979, p. 8.

The only substantial dispute raised in this case is over the construction of the statute -- i.e. whether specifically addressed advertising materials are letters within the Private Express Statutes. This narrow, sui generis issue has now been conclusively resolved by the Postal Service, the District Court and the Court of Appeals and does not merit further review. Surely it would serve no useful purpose for this Court to replicate the Court of Appeals' exegesis of centuries-old documents -- merely to affirm the obvious correctness of its historical conclusions. Accordingly, the writ should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: July 2, 1979

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Keith E. Secular

APPENDIX

APPENDIX A

HISTORICAL MATERIALS CITED TO THE COURT OF APPEALS

STATUTORY PROVISIONS

Act of 9 Anne, Ch. 10, §2 (1710)

Act of October 18, 1782, 23 Journ. Cont. Cong. 672-3

Act of September 22, 1789, Ch. 16, 1 Stat. 70

Act of March 3, 1791, Ch. 23, 1 Stat. 218

Act of Feb. 20, 1792, Ch. 7, §§5, 14, 16, 17, 22, 1 Stat. 232

Act of May 8, 1794, Ch. 23, §§5, 14, 16, 17, 22, 1 Stat. 354

Act of March 3, 1797, Ch. 19, §6, 1 Stat. 509

Act of March 2, 1799, Ch. 43, §§3, 14, 15, 20, 1 Stat. 733

Act of April 30, 1810, Ch. 37, §§7, 18, 19, 20, 21, 27, 2 Stat. 592

Act of March 3, 1825, Ch. 64, §§9, 19, 21, 22, 23, 24, 30, 4 Stat. 102

Act of March 2, 1827, Ch. 61, §3, 4 Stat. 238

Act of March 3, 1845, Ch. 43, §§1, 2, 3, 9, 10, 15, 5 Stat. 732

Act of August 31, 1852, Ch. 113, §8, 10 Stat. 121

Act of March 3, 1863, Ch. 71, §§19, 20, 31, 12 Stat. 701

Act of June 8, 1872, Ch. 335, §§93, 94, 95, 96, 99, 130, 131, 132, 133, 134, 146, 147, 148, 156, 157, 158, 159, 160, 163, 164, 170, 190, 196, 228, 239, 240, 17 Stat. 283

Revised Statutes, Title 46, Chs. 3-4 (1874)

Act of March 3, 1879, Ch. 180, §§7-23, 20 Stat. 355

Act of March 4, 1909, 35 Stat. 1123

Act of June 30, 1926, 44 Stat. Part I

Act of June 25, 1948, 62 Stat. at 776-7

Act of Sept. 2, 1960, 74 Stat. at 586

LEGISLATIVE MATERIALS

3 Annals of Congress, 356, 2d Cong., 1st Sess. (Feb. 2, 1792)

14 Congressional Globe, 195-96 (1845)

Report of the Commissioners to Revise the Statutes of the United States, H.R. Misc. Doc. No. 31, 40th Cong., 3d Sess. 2 (1869)

Report of the Committee Appointed by the Postmaster General to Examine and Revise the Postal Code, March 30, 1870

Cong. Globe, 41st Cong. 3d Sess. 30-37, 41-47, 83-86 (1870)

Cong. Globe, 42nd Cong., 1st Sess. 15, 31, 42, 71 (1971), 2640-53, 3893, 4091-92, 4105-06 (1872)

H.R. Rep. No. 164, 46th Cong., 2nd Sess. (1880)

POST OFFICE DEPARTMENT, POSTAL LAWS AND REGULATIONS

1873 edition: §§339, 421

1879 edition: §§215, 217, 219, 555

1887 edition: §§325, 359, 360, 361, 363, 705

1893 edition: §§274, 311, 312, 316, 674

1902 edition: §1136

1954 edition: 39 C.F.R. part 42 (1955)

OPINIONS OF THE SOLICITOR OF THE POST OFFICE DEPARTMENT

1 Ops. Sol. POD 36 (1873)

1 Ops. Sol. POD 534 (1880)

1 Ops. Sol. POD 537 (1880)

2 Ops. Sol. POD 2 (1885)

2 Ops. Sol. POD 40 (1885)

2 Ops. Sol. POD 453 (1887)

3 Ops. Sol. POD 211 (1898)

3 Ops. Sol. POD 359 (1902)

5 Ops. Sol. POD 193 (1909)

6 Ops. Sol. POD 372 (1916)

6 Ops. Sol. POD 397 (1916)

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8 Ops. Sol. POD 272 (1933)

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No. 78-1820

In the Supreme Court of the United States

OCTOBER TERM, 1978

ASSOCIATED THIRD CLASS MAIL USERS, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is not yet reported. The opinion of the district court (Pet. App. 18a-26a) is reported at 440 F. Supp. 1211.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1979 (Pet. App. 15a). A petition for rehearing was denied on April 3, 1979 (Pet. App. 16a). The petition for a writ of certiorari was filed on June 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether advertising circulars addressed to particular persons or locations are "letters" within the meaning of the Private Express Statutes, 39 U.S.C. 601-606 and 18 U.S.C. 1693-1697.

2. Whether application of the Private Express Statutes to such advertising circulars violates the rights of petitioner's members under the First or Fifth Amendment.

STATEMENT

The Private Express Statutes, 39 U.S.C. 601-606 and 18 U.S.C. 1693-1697, make it generally unlawful for any person other than the Postal Service to send or carry letters on post routes.[1] Pursuant to the rulemaking authority conferred by 39 U.S.C. 401(2), the Postal Service has issued regulations defining the term "letter" as used in the Private Express Statutes. Under the regulations, a letter is "a message directed to a specific person or address and recorded in or on a tangible object." 39 C.F.R. 310.1(a). The definition is amplified by 39 C.F.R. 310.1(a)(3), which provides that "[a] message is directed to a 'specific person or address' when, for

[1] It would perhaps be more accurate to say that the statutes prohibit the carrying of letters over post routes unless the proper postage is affixed and canceled in ink. Under 39 U.S.C. 601, letters may be carried "out of the mails" if certain specified conditions are met. The most significant of these conditions for present purposes are the requirements that such letters bear "the amount of postage which would have been charged on the letter if it had been sent by mail" and that such postage be "canceled in ink by the sender." Of course, in most circumstances, once the appropriate postage has been paid, the sender lacks any financial incentive to send his letters by some conveyance other than the mails. For this reason, the practical effect of the Private Express Statutes is to bar persons other than the Postal Service from carrying letters over post routes.

example, it is directed to a named or identifiable individual, organization, or official, or when it is directed to a specific place." 39 C.F.R. 310.1(a)(6) specifies that "[i]dentical messages directed to more than one specific person or address * * * constitute separate letters."

Petitioner is a trade association of business corporations and charitable organizations that distribute printed messages of various kinds through the mails at third-class postage rates. In particular, petitioner's members use the mails to distribute so-called "public advertisements" a term petitioner defines to mean "printed messages to the public directed in identical form to numerous persons or numerous addresses" (Pet. 4).

In September 1976, petitioner filed this suit in the United States District Court for the District of Columbia. The complaint sought a declaratory judgment invalidating the Postal Service's private express regulations (39 C.F.R. 310.1-310.7) in their entirety or, alternatively, to the extent that they prohibit the private carriage and delivery of "public advertisements." Petitioner also sought a permanent injunction restraining the Postal Service from enforcing its private express regulations and 18 U.S.C. 1696 in connection with "public advertisements." The parties filed cross-motions for summary judgment.

The district court granted summary judgment for the Postal Service (Pet. App. 18a-26a). The court ruled that the limited legislative history of the Private Express Statutes shows that communications such as "public advertisements" are "letters" for private express purposes (*id.* at 22a). The court was not persuaded that a different result is necessary simply because some materials falling within the definition of "letter" in 39 C.F.R. 310.1(a) do not qualify as first-class mail under the Postal Service's rate and inspection classification system. The court

explained that "Congress was not dealing with the same subject or purposes in the classification of letters for rate and inspection purposes and the prohibition of private express for letters" (Pet. App. 22a). The court also rejected petitioner's assertion that "the administrative interpretation of the term 'letter' has been so inconsistent as to invalidate the regulatory definition" (*id.* at 24a). The court observed that the disputed definition was adopted in compliance with the rulemaking procedures mandated by the Administrative Procedure Act. Finally, the court held that the Postal Service's construction of the Private Express Statutes does not violate the rights of petitioner's members to due process, freedom of speech, and equal protection of the laws (*id.* at 24a-26a).

The court of appeals affirmed (Pet. App. 1a-14a). In the court's view, neither the language nor the legislative history of the Private Express Statutes conclusively establishes that the Postal Service's interpretation of the term "letter" accords with congressional intent (*id.* at 4a, 6a). The court stated, however, that "the legislative text and history – while not dispositive of either party's contentions – tends to favor the Postal Service" (*id.* at 7a). With respect to the history of the Service's application of the Private Express Statutes, the court identified several apparent inconsistencies before 1940, but it ruled that whatever ambiguity or inconsistency may have existed in the past does not provide sufficient ground to invalidate the definition of "letter" that the Postal Service employs today (*id.* at 11a). The court held that the Service did not act arbitrarily in focusing on the distinction between messages addressed to a particular person or location, on the one hand, and unaddressed messages, on the other. The court declared that it had "no doubt that the specificity of the addressee is one indici[um] of the common understanding of 'letterness' " (*ibid.*). The court concluded (*id.* at 11a-12a; emphasis in original):

> Advertising circulars are *intended* for the perusal of the addressees. While [petitioner] is doubtless correct that the senders would not object if others saw the circulars, the key fact is that the sender's goal is to reach the particular persons who have been identified as most likely to be interested in the advertised products. It is for this that the sender pays. His attitude toward the possibility that others might happen across his circulars is beside the point.
>
> More broadly, we note that any definition is likely to appear arbitrary from some perspective for the simple reason that definitions draw lines they exclude some matters and include others despite similarities between the two classes. We simply conclude today that the Postal Service has settled upon a reasonable criterion – the presence or absence of an address – and that its definition suffers from no more than the level of arbitrariness which is inevitable.

Judge Wilkey dissented (Pet. App. 13a-14a). He agreed with the majority that the administrative history of the Postal Service's application of the Private Express Statutes is "something of a muddle" (*id.* at 8a, 13a) and asserted that, in his view, the Postal Service "has always latched onto whatever interpretation of the word 'letter' * * * would give it the most extensive monopoly power which Congress at that time seemed disposed to allow" (*id.* at 13a). Judge Wilkey declared that, although the Service's regulations would treat the two differently, he could perceive no distinction between an addressed advertising circular and an unaddressed circular folded within a newspaper that itself is addressed (*id.* at 14a). (Newspapers, whether addressed or not, have historically been exempt from the postal monopoly (see Pet. App. 6a-

7a & n.13) and are not "letters" under the Service's regulation. See 39 C.F.R. 310.1(a)(7)(iv).) Judge Wilkey concluded by suggesting that "[i]f we decline to include the advertising flyers [within the postal monopoly] * * *, we may then force the Postal Service to go to Congress to define accurately the desired postal monopoly scope" (Pet. App. 13a).

ARGUMENT

The court of appeals' decision is correct and does not conflict with the views of any other circuit or depart from any prior ruling of this Court. Further review is not warranted.

1. Petitioner contends (Pet. 7-11) that the Postal Service's definition of "letter" as that term is used in 18 U.S.C. 1696 and the other Private Express Statutes "flies in the face of common and ordinary usage" and therefore does not comport with congressional intent. Petitioner asserts that the principal characteristic of a letter, as that word is ordinarily understood, is that it is intended for the perusal only of the person or the organization to whom it is addressed. In petitioner's view, the addressed advertising circulars distributed by its members do not share this characteristic and therefore are not letters. Petitioner emphasizes that a distributor of such circulars does not seek to limit its audience to particular addressees but instead hopes that its circulars will attract the largest possible number of readers. There are several answers to this argument.

a. In the first place, petitioner's own definition of "letter" assumes that the word is intended to convey the notion of a message addressed to someone. As the court

of appeals observed (Pet. App. 11a; footnote omitted), "[w]e have no doubt that the specificity of the addressee is one indici[um] of the common understanding of 'letterness.' The dictionary definition which [petitioner] would have us adopt is not to the contrary. * * * Advertising circulars are *intended* for the perusal of the addressees." Nevertheless, petitioner insists that the Postal Service erred in emphasizing the fact that a message is addressed and in failing to attribute significance to the breadth of the message's intended audience. But the choice of important criteria in a given definition almost always involves a considerable degree of discretion. In the court of appeals' words, "any definition is likely to appear arbitrary from some perspective for the simple reason that definitions draw lines" (*id.* at 12a).

b. The Postal Service acted reasonably in deciding to concentrate on whether a message is addressed and not to adopt the further requirement that, in order to qualify as a letter, a message must be intended for the perusal of only the addressee. The definition adopted by the Service is easily administered. A simple physical inspection is sufficient to determine whether a given message is addressed to a specific person or location. The additional criterion advocated by petitioners would raise a host of practical problems. In order to decide whether a given message is covered by the postal monopoly, the Service would need to inquire into the intent of the sender. The size of the sender's intended audience would assume critical importance, and the Service would be called upon to draw fine distinctions based on the number of people to whom a message is addressed and the number of people other than the addressees whom the sender wishes to reach. This subjective inquiry would inevitably lead to increased administrative costs and a proliferation of disputes concerning a person's or organization's intent in distributing a particular message.

As the district court and the court of appeals correctly concluded (Pet. App. 5a-7a, 21a-22a), petitioner has not demonstrated that the Postal Service's definition of "letter" is contrary to the intention of the Congress that revised the postal monopoly statute and placed it in its modern form in 1872. Nor has petitioner shown that any subsequent Congress has disapproved the Service's view of the proper scope of the monopoly. Without clear evidence that the Service's regulations are inconsistent with the congressional purpose, the Service's reasonable and easily applied definition of "letter" should not be overturned. This is especially so in light of the serious practical difficulties that can be anticipated in the event petitioner's proposed alternative definition is adopted.

c. While the parties and the courts below agree that few judicial decisions have considered the proper scope of the postal monopoly, the cases that do exist support the Service's position. In *National Association of Letter Carriers* v. *Independent Postal System of America*, 336 F. Supp. 804 (W.D. Okla. 1971), aff'd, 470 F. 2d 265 (10th Cir. 1972), the court of appeals sustained the Service's view that unsealed, printed Christmas cards, bearing no personal message but sent by business entities to particular persons, are "letters" within the meaning of the Private Express Statutes. Such cards are quite similar to the addressed advertising circulars at issue here. They are distributed for business purposes, they are addressed to specific persons or locations, and the sender either hopes that they will be seen by persons other than the addressee or is indifferent to the prospect. See also *United States* v. *Bromley*, 53 U.S. (12 How.) 88, 96-96 (1851) (an unsealed merchandise order sent to a tobacconist is a "letter" within the meaning of the Private Express Statutes); *United States Postal Service* v. *Brennan*, 574 F. 2d 712, 717 (2d Cir. 1978), cert. denied, No. 78-653 (Jan. 15, 1979)

("the authority and necessity for [the Postal Service] to define 'letters' in view of the myriad methods and modes of communication which presently exist is obvious").

d. Petitioner contends (Pet. 9-10), however, that the Postal Service's own interpretation of the word "letter" in the Private Express Statutes has been inconsistent and therefore is not entitled to deference from the courts. This argument is not persuasive.

After reviewing the voluminous administrative materials and the characterization of these materials offered by petitioner and the National Mass Retailing Institute as amicus curiae, the court of appeals concluded that, although "no single definition emerges as the obvious choice of past administrators," the Postal Service's historical practice does not reveal "any clear ground for setting aside the determination of present [officials]" (Pet. App. 8a). The court observed in addition that the "apparent inconsistencies" in the Service's pronouncements on the scope of the postal monopoly during the 1930's "seem to have been resolved in 1940 when the Postal Service stated in a new edition of its pamphlet explaining the Private Express Statutes that 'unaddressed advertising handbills or circulars' were *not* letters, thus setting forth at least by implication the current rule" (*id* at 10a; emphasis in original). Thus, for nearly 40 years, the Service has acted on the assumption that addressed advertising circulars are "letters" covered by the postal monopoly and has not issued any public statement inconsistent with that position.

Moreover, it is undisputed that the definition of "letter" contained in the Service's current regulations was adopted in accordance with the rulemaking procedures mandated by the Administrative Procedure Act. Even if the Service's view of addressed advertising circulars once was different

than it is now, an administrative agency remains free to change its position, so long as it does so in accordance with statutorily required procedures. As this Court stated in *Commissioner* v. *P.G. Lake, Inc.*, 356 U.S. 260, 266 n.5 (1958), "prior administrative practice is always subject to change 'through exercise by the administrative agency of its continuing rule-making power.' "[2]

2. Petitioner maintains that, if the word "letter" in the Private Express Statutes is construed to include addressed advertising circulars, several constitutional problems arise. First, petitioner argues (Pet. 11-12) that the distinction between addressed and unaddressed advertisements is arbitrary and irrational and therefore violates the due process guarantee of the Fifth Amendment. Second, petitioner asserts (Pet. 12-14) that catalogs and newspaper advertising supplements are functionally equivalent to addressed advertising circulars; because such materials are exempt from the postal monopoly under the Service's regulations, petitioner contends that the regulations violate the equal protection component of the Fifth Amendment's Due Process Clause. Finally,

[2]Petitioner and the National Mass Retailing Institute as amicus curiae both express concern (Pet. 10; NMRI Br. 7, 20-24) that the Postal Service will attempt to expand its monopoly to embrace matters properly within the jurisdiction of other government agencies. In particular, they fear that the Service will attempt to regulate the electronic transmission of messages, a subject that is assertedly within the exclusive province of the Federal Communications Commission. But the proposed revision of the postal regulations cited by petitioner and amicus curiae has no bearing on this case. The present dispute concerns only addressed advertising circulars. The courts below did not consider any question regarding the application of the Private Express Statutes to other kinds of messages, and no such question is presented here. The Postal Service's treatment of the "public advertisements" distributed by petitioner's members is based solely on the current version of 39 C.F.R. 310.1(a), and petitioner's effort to expand the controversy to include other matters should be rejected.

petitioner argues (Pet. 14-16) that, when applied to addressed advertising circulars, the Private Express Statutes violate its members' First Amendment right to freedom of speech. Each of these contentions is without merit.

a. The simple answer to petitioner's due process objection is that petitioner's members are free to use unaddressed advertising circulars and thus to avoid the postal monopoly. If the distinction drawn by the Service's regulation is as arbitrary as petitioner contends, advertisers should be willing to forgo addressing their circulars; if they do, they will be able to take advantage of whatever financial benefits private carriage and delivery may offer. On the other hand, as the district court recognized (Pet. App. 25a), if addressing is crucial to petitioner's members' advertising goals, as it appears to be, then petitioner should not be heard to complain that the Postal Service has acted irrationally in using the specificity of a message's address as one criterion for defining the reach of the postal monopoly.

b. Petitioner's equal protection argument fails for similar reasons. The court of appeals correctly noted (Pet. App. 12a) that "any definition is likely to appear arbitrary from some perspective for the simple reason that definitions draw lines—they exclude some matters and include others despite similarities between the two classes." And, as the district court explained (Pet. App. 26a), newspapers and catalogs are reasonably distinguishable from addressed advertising circulars. Newspapers and periodicals have never been subject to the postal monopoly (see Pet. App. 6a-7a & n.13, 21a-22a & n.6), at least in part because Congress and the Service have sought to avoid restrictions on the press. Catalogs, when they become sufficiently large, no longer fit within

the ordinary conception of a letter, and the 24-page standard adopted by the Service's regulations (39 C.F.R. 310.1(a)(7)(v)) was apparently suggested by petitioner itself (see Pet. App. 26a). Indeed, if petitioner's members perceive no difference between newspapers and catalogs, on the one hand, and addressed circulars, on the other, they are free to use one or both of the former methods of advertising and thus to avail themselves of the exemptions provided by the Service's regulations. Petitioner's members have not been subjected, on the basis of some individual characteristic, to any rule not equally applicable to all actual or potential advertisers. Accordingly, they have not been denied the equal protection of the laws.

c. Finally, petitioner's First Amendment claim is insubstantial. The restraint to which petitioner's members are subject "is no different than that placed on any person subject to the Private Express Statutes, which have long been found constitutional" (Pet. App. 25a). See *Ex parte Jackson*, 96 U.S. 727 (1877); *United States Postal Service* v. *Brennan*, *supra*; *United States* v. *Black*, 418 F. Supp. 378 (D. Kan. 1976), aff'd, 569 F. 2d 1111 (10th Cir.), cert. denied, 435 U.S. 944 (1978). Petitioner's reliance on *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), is misplaced. The Court in that case stressed that it was not holding that commercial speech "can never be regulated in any way" (*id.* at 770). Indeed, the Court stated (*id.* at 770-771):

> Some forms of commercial speech regulation are surely permissible. * * *
>
> There is no claim, for example, that the prohibition [at issue here] is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.

The Postal Service regulations defining "letter" satisfy these requirements: they do not refer to the contents of the advertisements distributed by petitioner's members; they serve a significant government interest, the protection of the Postal Service's revenues;[1] and they "leave open ample alternative channels" by which petitioner's members may communicate their advertising message unencumbered by postal restrictions. And, of course, the regulations of which petitioner complains do not impose any prohibition on commercial free speech; petitioner's members retain the option to distribute their advertisements by mail at the Service's reasonable third-class rates. The regulations therefore do not impose any impermissible burden on commercial free speech.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1979

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[1] See *Council of Greenburgh Civic Associations* v. *United States Postal Service*, 586 F. 2d 935, 938 (2d Cir. 1978) (Kaufman, C.J., concurring; footnote omitted):

> Insofar as the statute is intended to prevent commercial concerns from conducting their business via an alternative to postal delivery, this is unquestionably a valid interest.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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ASSOCIATED THIRD CLASS MAIL USERS, *Petitioner*,

v.

UNITED STATE POSTAL SERVICE, *Respondent*.

On Writ of *Certiorari* to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE NATIONAL MASS RETAILING INSTITUTE, *Amicus Curiae*

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BRIEF FOR THE NATIONAL MASS RETAILING INSTITUTE, *Amicus Curiae*

The National Mass Retailing Institute supports the prayer of the petitioner, Associated Third Class Mail Users, for a writ of *certiorari* to review the judgment in this case of the United States Court of Appeals for the District of Columbia Circuit. Letters of consent by all parties to the filing of this brief pursuant to Rule 42 of the Court have been filed.

INTEREST OF *AMICUS CURIAE*

The National Mass Retailing Institute, Inc., ("NMRI") is a trade association of large retailers

whose purpose it is to protect, promote, foster and advance the general welfare and interest of the mass retailing business. NMRI appeared as *amicus curiae* in the instant case in the United States Court of Appeals for the District of Columbia Circuit. NMRI does not challenge the constitutionality of the postal monopoly, properly construed. NMRI, however, challenges interpretations of the private express statutes by the United States Postal Service which expand the word "letters" beyond its literal meaning to include ordinary wholly printed addressed advertisements, as well as other matter such as tape recordings, blueprints, and data processing tapes which clearly fall outside the commonly understood meaning of the term "letters". NMRI challenges these regulations because it believes that the cost of distributing addressed advertisements will be reduced if competition is permitted.

QUESTIONS PRESENTED

1. Whether an ordinary printed advertisement, by virtue of being addressed, becomes a "letter" within the meaning of 18 U.S.C. § 1696(a), a portion of the Private Express Statutes.

2. Whether the Postal Service has any authority, by interpretation of the Private Express Statutes, to override Congressional statutes delegating regulatory authority over certain subject matter to the ICC, the CAB and the FCC.

3. Whether the use of rulemaking authority by the Postal Service to increase its own revenues at the expense of potential private competitors deprives these potential competitors of property without due process.

STATEMENT OF THE CASE

The petition for *certiorari* of the Associated Third Class Mail Users ("ATCMU") gives this Court its first opportunity to interpret the criminal statutes whereby Congress in 1872 granted a limited statutory monopoly to the national post office.

On September 26, 1974, this case was initiated by the Associated Third Class Mail Users ("ATCMU") in the federal district court of the District of Columbia, invoking its jurisdiction under 28 U.S.C. § 1339 and 39 U.S.C. § 409(a). ATCMU sought a judicial declaration that wholly printed advertisements, addressed by affixing mailing labels, do not constitute "letters" within the scope of the postal monopoly and may be transmitted outside the postal system without exposing the sender to liability under the criminal laws.

On November 29, 1977, the District Court granted the Postal Service's motion for summary judgment and held that such advertisements are within the scope of the postal monopoly. 440 F.Supp. 1211 (Parker, J.). On March 9, 1979, the United States Court of Appeals for the District of Columbia Circuit affirmed by a 2-1 decision.[1]

The opinion of the court below is apparently founded upon two legal propositions. First, the Court of Appeals appears to endorse, with some hesitation, the District Court's conclusion that the postal monopoly encompasses not merely "letters," as described in the current criminal code, but somehow incorporates by inference the 1845 language of "letters . . . . or other

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[1] *Associated Third Class Mail Users* v. *United States Postal Service*, No. 78-1065, Slip Op. (U.S. App. D.C., March 9, 1979).

matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals." This proposition rests upon the premise that the 1872 Postal Act merely recodified, but did not contract, the postal monopoly which existed prior to the 1872 Act.[2]

The second legal proposition on which the Court of Appeals' opinion is grounded is that an item falling within the Postal Service's current administrative definition of the postal monopoly is thereby included within the scope of the criminal statutes which create the postal monopoly.[3]

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[2] The District Court held the change of the wording of the postal monopoly statutes in 1872:

> was part of a general recodification of the law in 1872 to weed out redundancy . . . . [T]he unheralded change in phrasing [by the 1872 Act] could only have been a simplification.

440 F. Supp. at 1214. The Court of Appeals cited the District Court's conclusions on this point with approval (although expressing some reservations in a footnote, Slip Opinion at 8 n.13):

> As Judge Parker pointed out . . . the 1872 Act was intended to reword and clarify the nation's postal laws *without substantive alteration*. . . . Absent some indication that Congress focused on the issue, we are reluctant to find in what purported to be a recodification a deliberate contraction of the postal monopoly. [Emphasis by the court, footnotes omitted.]

Slip Opinion at 7.

[3] The Court of Appeals held:

> We now turn to the ATCMU contention that the Postal Service definition of "letter" as "a message directed to a specific person or address and recorded in or on a tangible object" is arbitrary and contrary to common sense. . . . We simply conclude that the Postal Service has settled upon a reasonable criterion—the presence or absence of an address—and that its definition suffers from no more than the level of arbitrariness which is inevitable.

Slip Opinion at 12-13. The Court of Appeals also upheld the validity of the regulations in other respects. Although the court agreed the Postal Service's regulations defining the scope of the postal monopoly were "ambiguous and inconsistent" (Slip Opinion at 5-6), it concluded that they are nonetheless entitled to judicial deference. Slip Opinion at 12. The Court of Appeals also agreed with the District Court that the Postal Service was authorized to promulgate regulations which defined the scope of the postal monopoly prohibitions, notwithstanding the fact that the statutes being construed are criminal in nature and not part of the postal code. Slip Opinion at 3 n.5.

Meanwhile, encouraged by the broad holding in this case in the lower courts, the Postal Service has recently proposed a new, even broader, administrative definition of the word "letter" as used in the postal monopoly laws and cites the lower court holdings as support for its position.[4]

SUMMARY OF ARGUMENT

The last major revision of the Private Express Statutes occurred in 1872. At that time Congress amended the prior 1845 statute by deleting language which conferred a postal monopoly on "letters . . . or other

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[4] United States Postal Service, "Proposed Revisions in Comprehensive Standards for Permissible Private Carriage of Letters," 43 Fed. Reg. 60615 (Dec. 28, 1978). The publication of these proposed revisions, which generally expand the scope of the claimed monopoly, appears to have been prompted by the District Court's opinion in the present case. On January 10, 1978, the Deputy General Counsel of the Postal Service proposed the first draft of these revisions and noted: "with a victory in the ATCMU private express case under our belts, the time appears ripe to publish proposed revisions in our private express regulations." Memorandum from Roger P. Craig, Deputy General Counsel, United States Postal Service to C. Neil Benson, Chief Postal Inspector, USPS, and John F. Applegate, Assistant Postmaster General, Customer Service Department, USPS, dated January 10, 1978. (This memorandum was recently filed with the House Subcommittee on Postal Operations and Service during its current oversight hearings on the scope of the postal monopoly.)

matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals" and instead provided that the monopoly applied only to "letters."

The Postal Service has provided by regulation that, solely for the purposes of the Private Express Statutes,[5] the term "letter" means any "message directed to a specific person or address and recorded in or on a tangible object."

That broad definition, which applies to wholly printed advertisements (along with many other items), is much broader than Congress intended, and is inconsistent with the interpretation which the Post Office Department gave to the scope of its monopoly for many years.

Legislative history prior to the enactment of the 1872 statute indicates that the term letter was intended to apply to current and personal correspondence in writing.

This interpretation is also consistent with the contemporaneous interpretation of the term letter, as reflected in an 1873 opinion by the Post Office Department Solicitor, and by many other subsequent opinions and regulations.

It was not until 1974, with the benefit of 100 years of hindsight, that the Post Office Department clearly and unambiguously asserted the broad monopoly power at issue in this case. In fact, in the intervening years,

[5] See, e.g. U.S. Postal Service Publication 42, § 222.1 (1976): "Letters and letter packages refer to that class of mail for personal handwritten, typewritten, or recorded communications having the character of current correspondence."

Post Office officials frequently complained to the Congress that their monopoly power does not extend to third class items. This failure by the Postal Service (and its predecessor organizations) to assert broad control for so long a period is strong evidence that the broader powers now claimed did not and do not exist. The current assertion of monopoly power by the Postal Service is simply an administrative fiat—inconsistent with the intent of Congress—and therefore unlawful.

The Postal Service regulation is also unlawful because it usurps power granted by Congress to other federal agencies, specifically the ICC, the FCC, and the CAB. The Department of Justice has filed written comments with the Postal Service criticizing similar proposed regulations on this ground.

Under the regulations, items ranging from commercial papers, documents, and written instruments to audit media and business records, many of which are transported by common carrier subject to regulation by the ICC, are classified, by the Postal Service, as "letters." Likewise, the Postal Service regulations may interfere with CAB regulations liberalizing rules governing indirect air cargo carriers. Moreover, the regulations preclude competition in the supply of certain "facilities and services incidental to the electronic transmission of messages," a subject which Congress has delegated to the FCC for regulation.

This Court should grant *certiorari* to consider whether the Postal Service regulations improperly infringe upon the jurisdictional areas of other federal agencies.

Finally, the Postal Service has abused its rulemaking power by using that power in such a way as to

further its own financial interest at the expense of would-be competitors and users of the services of competitors in the private sector. If the Postal Service regulation is not overturned, these would-be private competitors face criminal sanctions if they attempt to provide delivery services for printed advertisements. This self-serving use of its rulemaking power by the Postal Service is inconsistent with recent decisions of this Court, holding that "those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes."

ARGUMENT

A. The Decisions Below Permit The Postal Service To Expand Its Jurisdiction Beyond The Bounds Of Its Statutory Authority

This case involves the validity of the Postal Service claim of monopoly over the carriage of substantially all materials which can be sent by third class mail. The Post Office has not always interpreted its statutory authority as being so expansive.

When it established the Post Office Department in 1789,[6] Congress restrained the private carriage of a limited range of articles from among those that were mailable. The scope of this statutory protection varied, however, from statute to statute, particularly during the

[6] Throughout this brief, the "*Post Office Department*" refers to the executive department which was created by the Act of September 22, 1789, ch. 16, 1 Stat. 70, and abolished by the Postal Reorganization Act, Pub. L. 91-375, 84 Stat. 719, 39 U.S.C. § 201 (1970). The "*Postal Service*" refers to the independent federal agency established by the Postal Reorganization Act of 1970. Finally, the "*Post Office*" will be used to refer to both postal organizations.

first three quarters of the nineteenth century.[7] The most recent substantive change in the scope of the postal monopoly statutes was by the Act of June 8, 1872, which revised and codified all of the postal laws of the United States. The gist of the 1872 Act, insofar as this case is concerned, (ch. 335, §§ 227-39, 17 Stat. 283, 311-12) was that, by its terms, it reduced the scope of the postal monopoly from "letters . . . or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals" as used in the 1845 statute, to simply "letters or packets."[8]

[7] The basic scope of the monopoly was changed on ten occasions, in the years 1792, 1794, 1825, 1827, 1836, 1838, 1845, 1852, 1864, and 1872. Act of February 20, 1792, ch. 7, § 14, 1 Stat. 236 (expanding scope of prohibition and fine); Act of May 8, 1794, ch. 23, § 14, 1 Stat. 360 (addition of specific prohibition against common carriers); Act of March 3, 1825, ch. 64, § 18, 4 Stat. 107 (clarification of restraints on common carriers, elimination of prohibition against private expresses); Act of March 2, 1827, ch. 61, § 3, 4 Stat. 238 (prohibition against establishment of foot or horse post); Act of July 2, 1836, ch. 270, § 42, 5 Stat. 89 (extension of monopoly to navigable waterways); Act of July 7, 1838, ch. 172, § 2, 5 Stat. 283 (extension of monopoly to railroads); Act of March 3, 1845, ch. 43, §§ 9, 10, 5 Stat. 735-36 (expansion of monopoly to all mailable matter, reinclusion of prohibition against private expresses); Act of August 31, 1852, ch. 113, § 8, 10 Stat. 141-42 (exception to monopoly for stamped letters); Act of March 25, 1864, ch. 40, § 7, 13 Stat. 37 (authorizing Postmaster General to suspend exception for stamped letters); Act of June 8, 1872, ch. 335, §§ 227-39, 17 Stat. 283, 311-12 (restricting the prohibition to the carriage of "letters"). *See*, G. L. Priest, "The History of the Postal Monopoly in the United States," 13 J. Law & Econ. 33 (1973).

[8] The criminal prohibitions in the 1872 postal code actually extend to the carriage of "letters and packets," providing:

> That no person shall establish any private express for the conveyance of letters or packets, or in any manner cause or provide for the conveyance of the same by regular trips or at stated periods, over any post route which is or may be

We have found no definitive legislative history to explain this crucial change in the wording of the monopoly statutes. Comment by Congressmen and postal officials at the time the 1872 law was enacted focused on several other revisions in the postal code, but was silent on the change in the postal monopoly.[9]

This lack of comment is explainable by prior legislative history which is quite explicit.

In 1863, the Post Office Department recommended a revision and codification of the postal laws. One recommended change concerned classification. The Post Office Department recommended that mail be divided into three classes.

> 1st, letters; 2d, regular printed matter; 3d miscellaneous matter . . .

Congress adopted this proposal.[10]

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established by law. . . . Act of June 8, 1872, ch. 335, § 228, 17 Stat. 283.

The term "packet," however, is an archaic word for a letter of four or more pages, and, therefore, it is correct to view the monopoly as extending only to "letters." *See, Williams* v. *Wells Fargo Company & Co. Express*, 177 F. 352 (8th Cir. 1910). The courts below and all parties to this litigation agree on this interpretation of the phrase "letters and packets."

[9] The legislative record of the enactment of the 1872 Postal Code contains no explanation of the intended scope of the postal monopoly. It was not mentioned in debate nor in any extant committee report. *See*, Cong. Globe, 41st Cong., 3d Sess., 30-37, 41-47, 83-86 (1870); Cong. Globe, 41st Cong., 3d Sess., 957-61 (1871); Cong. Globe, 42d Cong., 1st Sess., 15, 31, 42, 72, 3640-53, 3893, 4091 (1872).

[10] Act of March 3, 1863, ch. 71, § 19, 12 Stat. 701.

The Post Office Department also recommended changes in the Private Express Statutes. Specifically, it was proposed that the prohibition against private carriage "of any letters, packets, or packages of letters, or other matter properly transmittable in the United States mail," be narrowed by adding the underscored language: "except newspapers, pamphlets, magazines, periodicals, *and other matter classed in this code as miscellaneous mail matter. . . .*[11] (emphasis added).

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[11] The complete text of the relevant provisions of the 1863 recommendations was as follows:

> § 47. Mailable matter is divided into three classes, namely: 1st, letters; 2d, regular printed matter; *3d miscellaneous matter.*
>
> § 48. The first class embraces all correspondence wholly or partly in writing, except that mentioned in the third class; the second class embraces all mailable matter exclusively in print, and regularly issued at stated times, without addition by writing, mark, or sign; *the third class embraces all other matter which is or may hereafter be by law declared mailable, embracing all pamphlets, occasional publications,* books, book manuscripts and proof-sheets, whether corrected or not; maps, *prints,* engravings, blanks, flexible patterns, samples, and sample cards; phonographic [sic] paper, letter envelopes, postal envelopes or wrappers; cards, paper, plain or ornamental; *photographic representations of different types;* seeds, cuttings, bulbs, roots and scions.
>
> § 169. It shall not be lawful for any person or persons to establish any private express or expresses for conveyance, nor in any manner to cause to be conveyed, or provide for the conveyance or transportation, by regular trips or at stated periods or intervals, from one city, town, or other place, to any other city, town or place in the United States, between, and from, and to, which cities, towns, or other places the United States mail is regularly transported under the authority of the Post Office Department, of any letters, packets, or packages of letters, or other matter properly transmittible (sic) in the United States mail, except newspapers, pamphlets, magazines, periodicals, *and other matter classed in this code as miscellaneous mail matter. . . .*

Post Office Department, "Revision of the Laws: Prepared by the Post Office Department for the Committee on the Post Office and Post Roads," 1863. (emphasis added).

Congress did not act on this proposal in 1863. However, the quoted language reflects the understanding of the Post Office Department that "letters " were separate and distinct from "miscellaneous mail matter" and that it was appropriate for the Post Office to assert monopoly privileges only over "letters."

This distinction between "letters" and other "miscellaneous mail" was, we submit, codified by Congress in 1872. Congress did this by conferring a postal monopoly over "letters," a term which the Post Office Department had already recognized as being narrowly defined.[12]

A similar narrow interpretation of the postal monopoly was adopted by the Post Office Department following enactment of the 1872 legislation. From the beginning lawyers for the Post Office Department prepared short legal opinions concerning many aspects of the postal laws. The first opinion concerning the scope of the postal monopoly was written only one year after the 1872 Act. In a general discussion of the purpose of the monopoly provisions, the Post Office Department lawyer declared:

> It was the purpose of the [Private Express Statutes] to prevent, by penal enactments, the transmission of *mailable matter of the first class (all correspondence wholly or partly in writing)* by express . . . (emphasis added).

1 Op. Sol. P.O.D. 36 (1873). The 1873 opinion, deferring to the statutory definition, uses the phrase "correspondence wholly or partly in writing" as equivalent to the statutory term "letters."

This early interpretation of the 1872 statute by the Post Office Department is particularly important in determining the scope of the postal monopoly which was intended by Congress. It is axiomatic that the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion . . ." is entitled to great weight by the courts in construing legislative intent. *Power Reactor Development Co.* v. *International Union of Electrical Radio and Machine Workers,* 367 U.S. 396, 408 (1961) (quoting *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294 (1933).) *Accord, Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). *See, FTC* v. *Mandel Bros., Inc.,* 359 U.S. 385, 391 (1959); *FHA* v. *The Darlington, Inc.,* 358 U.S. 84, 90 (1958).

Administrative regulations, legal opinions and actions in the four decades following the 1872 Act were fully consistent with the Postal Solicitor's narrow 1873 Opinion.[13] For example, *Postal Laws and Regulations* issued in 1893 stated:

> It will be observed that the Congress has not yet, by statute, extended the [postal] monopoly to sec-

[12] Further support for this interpretation is found in an 1882 report of the House Committee on Post Office and Post Roads. That report, after distinguishing between letters on the one hand, and "transient newspapers, circulars, and other printed matter," as well as "third and fourth class matter," went on to explain:

> Following the example of the oldest and best established governments in the world, the founders of the Constitution delegated to the government a monopoly in the carriage of letters. . . . Competition by private carriers is, however, allowed for all the other classes of matter permitted to go in the mails.

House Rep. 47-1816, 47th Cong., 2d Sess. (1882), p. 8.

[13] Postal Solicitor's Opinions during this period make clear that the postal monopoly was interpreted to extend only to "letters," *i.e.*, materials of the "first-class" under the 1872 Postal Act. Indeed, P.O.D. Solicitors were careful to point out that the monopoly

ond, third, or fourth class matter, although admitted to the mails. [Sec. 674] [14]

Congress never has.

However, beginning in the second decade of this century, Postal Solicitors began to abandon their traditional view of the limited scope of the postal monopoly and to expand their interpretation of the word "letters." [15] In 1916, the Postal Solicitor issued three brief opinions asserting that letters included certain wholly printed matter including advertisements, without making a distinction between addressed and unaddressed matter.[16] These three opinions, contradicted by prior and subsequent interpretations, are the only explicit administrative precedents cited by the Postal Service, prior to the regulations issued in 1974, for the monopoly asserted in this case.

Although some of the Postal Solicitor's Opinions after 1910 can be read to assert a claim of monopoly over the carriage of almost anything, postal officials were far less expansive in testimony to Congress during this period. In 1911, for example, in Senate hearings on the issue of whether the Post Office should monopolize parcel post, the Second Assistant Postmaster General, in sworn testimony, admitted that "the Government monopolizes the carriage of first-class mail, but has never assumed a monopoly of any other class." [17] Subsequently, in the depression year of 1930, the Postmaster General was faced with a radically declining mail volume and a desperate need for revenues. In testifying to Congress in support of an increase in

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did not include other matters, such as postal cards [2 Op. Sol. P.O.D. 40 (1885); 2 Op. Sol. P.O.D. 453 (1887)] and commercial papers [3 Op. Sol. P.O.D. 211 (1898); *see*, 2 Op. Sol. P.O.D. 2 (1885); 5 Op. Sol. P.O.D. 193 (1909). *But cf.* 3 Op. Sol. 359 (1902)] even though these were made "first class" by the new classification scheme adopted in the Postal Act of March 3, 1879, ch. 180, § 8, 20 Stat. 355.

In the 1902 edition of the *Postal Laws and Regulations*, the administrative description of the postal monopoly was reworded to avoid any implication that the postal monopoly extended to all first class matters:

> The Congress . . . has vested in the Post Office Department an absolute monopoly of the transportation of letters and packets . . . [T]he Government monopoly does not extend to all matter admitted to the mails but only letters. P.O.D., *Postal Laws and Regulations*, § 1136 (1902 ed.).

A 1909 P.O.D. Solicitor's Opinion makes clear that this reformulation of the postal regulation did not imply any expansion of the administrative interpretation of the postal monopoly. In advising a U.S. Attorney on the scope of the monopoly, P.O.D. Solicitor Goodwin wrote:

> *As to what is a "letter," it has* never, so far as I have been able to learn, *been defined other than the common acceptation of the term. As to whether reports, invoices, etc., would constitute "letters"* within the meaning of the statute, *it would seem to me depends somewhat upon the circumstances of each case.* If they partake of the nature of *personal correspondence*, the conveying of written information from one to another, I am inclined to think that they should be construed as coming within the definition of "letters." However, this question is not free from doubt, and as *the question is still an open one*, so far as I am advised, I should be glad to see it raised in this case. . . . 5 Op. Sol. P.O.D. 193 (1909) (emphasis added).

[14] See also, *Postal Laws and Regulations*, 1879 ed., § 555; id. (1887 ed.) § 706.

[15] *See, e.g.*, 7 Op. Sol. 131 (1921) (samples of merchandise from Montgomery Ward).

[16] 6 Ops. Sol. P.O.D. 372 (1916); Id. 397; Id. 453.

[17] Testimony of Hon. Joseph Stewart, Hearings on S. Res. 56 before The Subcommittee on Parcel Post of the Senate Committee on Post Offices and Post Roads, 62d Cong., 1st Sess., Vol. 1, at 139 (1911).

first-class postage, he explained why an increase was not being requested in the other postage rates:

> As you understand, we have a monopoly only of first-class mail. This is the trouble. If Congress gave the Post Office Department a monopoly of the first, second, third, and fourth class, then we would get all the business, but *we have a monopoly of only sealed-letter mail. We have to come into competition with every sort of carrier on everything else.*[18] (emphasis added).

This long history of reluctance by the Postal Service (and its predecessor) to assert monopoly power over items other than first-class mail is highly significant. As this Court said in *FTC* v. *Bunte Bros., Inc.,* 312 U.S. 349, 352 (1941):

> Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.[19]

In 1974, the Postal Service adopted its most expansive definition of "letter" (until the positions adopted by it below). The 1974 regulations declare that the word "letter" means any "message directed to a specific person or address and recorded in or on a tangible object." 39 C.F.R. § 310.1 (1978). This 1974 administrative definition concededly includes addressed advertising brochures which are the subject matter of this case. In addition, it covers a great deal more. The Postal Service claims a monopoly over payroll checks,[20] data processing tapes, cards, and programs,[21] intra-company memoranda,[22] plastic credit cards,[23] and the hardcopy of electronically transmitted messages.[24] All of the foregoing, according to the Postal Service, are "letters" (but only for the purposes of the Private Express Statutes).

The Public Counsel of the Postal Rate Commission has observed that Postal Service's current regulations represent an expansion of its prior claim of monopoly.[25]

[18] Hearings on H.R. 14246, the Post Office Appropriation Bill for 1932, before the Subcommittee of the House Committee on Appropriations, 71st Cong., 3d Sess., at 227-28 (1930).

[19] Citing *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294 (1933).

[20] United States Postal Service, Private Express Statutes (PES) letter 75-1 (1975).

[21] United States Postal Service, Private Express Statutes (PES) letters 75-11 (1975) and 78-11 (1978).

[22] United States Postal Service, Private Express Statutes (PES) letter 74-15 (1974).

[23] United States Postal Service, Private Express Statutes (PES) letter 76-8 (1976).

[24] United States Postal Service, Private Express Statutes (PES) letter 78-14 (1978).

[25] The Public Counsel of the Postal Rate Commission commented on the proposed version of the current regulations:

> [T]he Postal Service proposes to expand the legal basis of its statutory monopoly. The proposed definition of the word "letter" would expand the scope of the monopoly to include the following materials not formerly letters [listing fourteen items including "catalogs"]. . . . It accordingly appears that the Postal Service wishes to expand the legal basis of its monopoly over the carriage of "letters" to nearly all mailable matter except parcels and unaddressed circulars.

"Legal Memorandum of Assistant General Counsel, Litigation Division, Concerning the Role of the Postal Rate Commission in

Further, the fact that the Postal Service has been expanding its claim of monopoly was recently emphasized by a former General Counsel of the Post Office Department:

> [*T*]*he fact of the matter is that there has been an expansion in the basic definition of what constitutes a letter.* It is clear the post office is presently maintaining that materials, which *no one in their right mind would have ever believed come close to the definition of a letter,* are letters, and it is causing a lot of trouble.[26] (emphasis added).

This Court has firmly declared that a federal agency may not expand the scope of its jurisdiction beyond the bounds of its statute, especially where, as here, to do so is to expand the scope of a penalty. *See, International Brotherhood of Teamsters* v. *Daniel,* 58 L.Ed.2d 808, 820 and n. 20 (U.S. 1979); *SEC* v. *Sloan,* 436 U.S. 103, 117-119 (1978); *Adamo Wrecking Co.* v. *United States,* 434 U.S. 275, 287 and n. 5 (1978); *United States* v. *Larionoff,* 431 U.S. 864, 873, n. 12 (1977); *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 212-14 (1976); *Dixon* v. *United States,* 381 U.S. 68, 74 (1965).

Adamo Wrecking Co. is particularly pertinent because it involved the interpretation of a statute which, from the Government's standpoint, was admittedly ambiguous and involved criminal sanctions. This Court struck down the EPA interpretation, reasoning:

> This lack of specific attention to the statutory authorization is especially important in light of this Court's pronouncement in *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140, 89 L.Ed. 124, 65 S. Ct. 161 (1944), that one factor to be considered in giving weight to an administrative ruling is "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

434 U.S. 275, 287, n. 5.

We respectfully submit that the Postal Service regulation is not grounded upon "specific attention to the statutory authorization" and certainly there has been no "thoroughness evident in its consideration," nor has there been "consistency with earlier and later pronouncements." There is no way that the Postal Service could have acquired a monopoly over the majority of third-class mail except by administrative fiat—a fiat which simply exceeds the scope of its statutory authority. The upholding of the claim of monopoly by the court below, to the extent it was grounded in the validity of the Postal Service's regulations, thus directly conflicts with a long line of decisions of this Court that a federal agency does not have the power to expand its statutory authority.

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the Exercise of the Legal Controls Over the Private Carriage of Mail and the Postal Monopoly," at 1-2 (1973). The proceeding for which this memorandum was submitted was dismissed by the Postal Rate Commission for lack of jurisdiction.

[26] Remarks of Timothy J. May, former General Counsel, Post Office Department, at a conference on "Postal Service Issues," American Enterprise Institute, October 13, 1978, Transcript, at 230.

B. The Court Should Grant The Petition For *Certiorari* To Resolve Important And Fundamental Jurisdictional Conflicts Among The Postal Service, The ICC, The CAB, And The FCC

The gist of the holding of the court below appears to be a determination that the postal monopoly extends at least as far as that claimed in the Postal Service's 1974 regulations and perhaps to all addressed matter transmittable in the mail.

This endorsement by the D. C. Circuit of the broad claims of the Postal Service with respect to the 1974 regulations will subject the public to confusing and conflicting directions from several federal agencies: the Postal Service, the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Communications Commission.

The Interstate Commerce Commission is charged generally with the duty to regulate "any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce . . . ." (49 U.S.C. § 304(a)(1); § 303 (a)(14).) Pursuant to this duty the ICC has issued certificates and permits to carriers authorizing the transportation of commercial papers, documents, written instruments, audit media, and business records.[27]

In its evaluation of the Postal Service's 1974 Private Express Statute regulations (then in proposed form), the ICC commented:

> If the proposed regulations go into effect, "letters" would include checks and other commercial papers, legal papers and documents, matters sent for auditing or preparation of bills, and matter sent for filing or storage. As a result, specified materials, now transported by for-hire carriers, would fall squarely within the prohibitions of the Private Express Statute.
>
> * * * *
>
> Absent extensive and thorough justification, the proposed [now current] regulations and the concomitant expansion of the Postal Service's already existing monopoly, appear to be arbitrary, capricious, and unwarranted. In light of the foregoing, the Interstate Commerce Commission opposes the proposed regulations to the extent that they create a regulatory overlap which infringes upon the Commission's jurisdiction and jeopardizes the constitutional rights of the for-hire carriers which it regulates.[28]

The U.S. Department of Justice has also remarked upon the potential for interagency conflict arising from the Postal Service's ever expanding claims of a statutory monopoly:

> *The potential for interagency conflicts implicit in the Postal Service's apparent policy of simply overriding other regulatory systems is relatively clear.* The Civil Aeronautics Board, for example, just issued proposed new regulations greatly liberalizing regulations governing indirect air cargo carriers—freight forwarders—under authority of recent legislation including the Air Cargo and Airline Deregulation Acts . . . . The purpose of these statutes is to sharply reduce the level and intensity of Federal regulation of air carriers and freight forwarders, and thus afford consumers a

[27] Interstate Commerce Commission, Letter from Arthur J. Cerra, Acting General Counsel, Interstate Commerce Commission, to Louis A. Cox, General Counsel, United States Postal Service, dated August 23, 1973.

[28] *Id.*

> wider variety of competing service options. Yet under the . . . Postal Service regulations, the ability of consumers to use these firms to ship documents and other materials that may be denominated "letters" could be adversely affected.[29] (emphasis added).

The Department of Justice has also expressed concern about the expansion of the Postal Service monopoly into areas regulated by the ICC and the FCC.[30]

The conflict with communications regulation arises from the Federal Communications Commission's statutory jurisdiction over "facilities and services incidental to the electronic transmission of messages." 47 U.S.C. § 153 (1970).

In United States Postal Service Private Express Statutes ("PES") Letter 78-14 (July 3, 1978), the Postal Service conceded that it had no jurisdiction over the electronic transmission of information over telephone lines. However, the Postal Service ruled that "carriage of . . . documents" to a company engaged in the business of transmitting facsimiles of documents over telephone lines did constitute the carriage of "letters," within the meaning of Postal Service regulations, as was "the delivery of the facsimile

[29] U.S. Department of Justice, "Comments of the United States Department of Justice, In the matter of Amendments to 39 C.F.R. Parts 310 and 320: Proposed Revisions in the Comprehensive Standards for Permissible Private Carriage of Letters," at 64-65 (March 13, 1979) (emphasis added). While the comments quoted were in response to new regulations proposed in 1978, the proposed regulations are identical to current regulations insofar as the quoted passage is concerned.

[30] *Id.*

documents to the addressees after transmissions . . . ." According to the Postal Service, both actions were unlawful (unless the private carrier paid the prescribed postage to the Postal Service).

Reacting to these claims, the FCC has stated, in tones echoing those of the ICC:

> [I]t is the FCC's position that Congress has excluded all aspects of the telecommunications services, including physical delivery . . . . [T]he proposal to subject such physical delivery to the Private Express Statutes is beyond the jurisdiction of the Postal Service.[31]

Thus, the opinion of the court below, which uncritically accepts the Postal Service's expansive administrative view of its own monopoly, raises fundamental jurisdiction conflicts between the Postal Service on the one hand, and the ICC, CAB, and FCC, on the other.

We respectfully submit that this Court should grant *certiorari* in the instant case to resolve these jurisdictional conflicts or, at the very least, to interpret the Postal Statutes in a way which harmonizes the regulatory schemes.

Where such jurisdictional conflicts exist between agencies, it may be especially appropriate for this court to ensure that the balance of regulatory authority has been properly maintained and that one agency, unilaterally issuing regulations, has not usurped pow-

[31] Letter from Robert R. Bruce, General Counsel, Federal Communications Commission to Louis A. Cox, General Counsel, United States Postal Service, dated March 12, 1979, p. 7.

ers appropriately delegated to other administrative bodies.[32]

C. The Use Of Rulemaking Authority By The Postal Service To Increase Its Own Revenues Through A Broadened Administrative Interpretation Of A Criminal Statute Contravenes Recent Decisions Of This Court Interpreting The Due Process Clause Of The Constitution

The Postal Service regulations which are the subject of this litigation have a direct and obvious impact on the income of the Postal Service, and on the income of its potential competitors. If, as the Postal Service asserts, it enjoys monopoly power over the delivery of second and third class mail, the Postal Service will realize all of the income from performance of this function in the United States, and will face no competitive pressures either with respect to price or quality of service.

The Postal Service is well aware of the value of this monopoly, as reflected in the following testimony, given before the Congress in 1930 by the Postmaster General:

> As you understand, we have a monopoly only of first-class mail. That is the trouble. If Congress gave the Post Office Department a monopoly of the first, second, third, and fourth class, then we would get all the business, but we have a monopoly of only sealed-letter mail. We have to come into competition with every sort of carrier on everything else.[33]

[32] See generally, *Udall* v. *FPC*, 387 U.S. 428 (1967) where this Court granted *certiorari* to consider whether the FPC, in awarding a license to construct a hydroelectric power plant to a consortium of private power companies, had failed to properly take account of claims by the Department of Interior that the project should be performed by federal development in accordance with Interior's responsibility for the protection and conservation of fisheries.

As indicated above, the Congressional Statute (18 U.S.C. § 1696) prohibits the private conveyance only of "letters or packets." In 1974, the Postal Service amended its definition of that term to include any "message directed to a specific person or address and recorded in or on a tangible object." (39 C.F.R. § 310.1(a)). In 1978, the Postal Service proposed regulations to extend its monopoly still further by providing that public advertisements would be characterized as letters if they are delivered according to a "selective delivery plan." (43 *Fed. Reg.* 60615 (1978)).

The exact scope of the monopoly conferred by Congress in its 1872 statute is of critical importance both to the Postal Service and to those private American businessmen who would like to compete with the Postal Service if it is lawful to do so. However, it is the Postal Service, through the exercise of rulemaking, which has determined that the Congressional grant of postal monopoly is to be interpreted in an all encompassing manner, to the detriment of the Postal Service's potential competitors. The fact that the Postal Service has exercised rulemaking in its own self-interest raises serious questions of due process which this Court should address.

[33] Hearings on H.R. 14246, the Post Office Appropriations Bill for 1932, before a Subcommittee of the House Committee on Appropriations, 71st Cong., 3d Sess., at 227-28 (1930).

A similar situation was considered by the Court in *Gibson* v. *Berryhill,* 411 U.S. 564 (1973). In that case, the Alabama legislature repealed a statute which expressly permitted the practice of optometry by individuals employed by business corporations. A complaint was then filed by the Alabama Optometric Association, a professional organization whose membership was limited to independent practitioners of optometry, against duly licensed optometrists who were employees of Lee Optical Company. The complaint was filed with the Alabama Board of Optometry, requesting revocation of the licenses of the named individuals. Under Alabama law, the Board had authority to issue, suspend and revoke licenses for the practice of optometry.

Suit was brought by the employee-optometrists before a three-judge Federal District Court, which granted an injunction prohibiting the Board from holding hearings or suspending the licenses of the employee-optometrists. On appeal, this Court unanimously upheld the District Court decision.[34]

The Board of Optometry was composed solely of optometrists engaged in private practice. Therefore, suspension of the licenses of employee-optometrists would "possibly redound to the personal benefit of members of the Board." In upholding the District Court opinion, this Court stated:

[34] The case was remanded to the District Court, however, to enable that court to consider whether a related decision of the Alabama Supreme Court was adequate to protect the rights of the employee-optometrists.

> It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.

411 U.S. at 579.

The situation in *Berryhill* and the Postal Service's rulemaking display instructive similarities. In each case, an organization with regulatory authority attempted to pass on a matter in which it was not disinterested. In each case, the monetary well-being of other persons was adversely affected. In *Berryhill,* this Court upheld a lower court ruling that:

> To require the Plaintiffs to resort to the protection offered by state law in these cases would effectively deprive them of their property, that is the right to practice their professions, without due process of law. . . .

411 U.S. at 571.

Comparable injury and comparable loss of due process results to all those who would like to engage in the business of delivering public advertisements and other matter which, if mailed, would constitute second and third class mail but cannot do so because of the self-serving regulations of the Postal Service.

The due process considerations become even more significant where, as here, criminal sanctions may be imposed. In *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972), this Court held that it was a denial of due process for traffic offenses to be tried by the village mayor. It was reasoned that revenue from the traffic offenses was an important source of revenue to Monroeville. Therefore, it would be virtually impossible for the

mayor, who had executive fiscal responsibilities to the village, to be impartial in ruling on traffic cases, even though the mayor had no personal financial stake in the outcome of the trials. The test in *Ward* was whether an average man would face a possible temptation. (409 U.S. at 60.)

This Court should grant *certiorari* to consider whether the decision in the lower court in this case is consistent with this Court's opinions in *Berryhill* and *Ward*.

CONCLUSION

For the foregoing reasons, the petition of Associated Third Class Mail Users for a writ of *certiorari* to review the judgment below of the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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Dated: July 6, 1979